

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

D ZINE PARTNERS, LLC; and)
MARWA ZAATARI;)
)
Counter-Plaintiffs,)
)
VS.) No. 3:21-CV-00884-M
)
GLOBAL PLASMA SOLUTIONS, INC.,)
)
Counter-Defendant.)
)

MOTION HEARING
BEFORE THE HONORABLE BARBARA M.G. LYNN
UNITED STATES DISTRICT COURT JUDGE
NOVEMBER 8, 2022
DALLAS, TEXAS

FOR THE PLAINTIFF/COUNTER-DEFENDANT:

ROBERT A. MUCKENFUSS
KELLY A. WARLICH
McGUIREWOODS, LLP
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
(704) 343-2052

JUSTIN R. OPITZ
ADDISON FONTEIN
BRITTNEY M. ANGELICH
McGUIREWOODS, LLP

2000 McKinney Avenue, Suite 1400
Dallas, TX 75201
(214) 932-6471

LUCY JEWETT WHEATLEY
McGUIREWOODS, LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4320

FOR THE DEFENDANTS/COUNTER-PLAINTIFFS:

(Marwa Zaatar and D Zine Partners, LLC)

JAMES D. SHIELDS
DAVID A. SHIELDS
BART F. HIGGINS
SHIELDS LEGAL GROUP
16400 Dallas Parkway, Suite 300
Dallas, TX 75248
(972) 788-2040

JADD F. MASSO
CLARK HILL, PLC
901 Main Street, Suite 6000
Dallas, TX 75202
(214) 651-4716

(Enverid Systems, Inc.)

KENDAL B. REED
AARON Z. TOBIN
TARYN E. OURSO
CONDON TOBIN SLADEK THORNTON NERENBERG, PLLC
8080 Park Lane, Suite 700
Dallas, TX 75231
(214) 691-6300

Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR
Federal Official Court Reporter
1100 Commerce Street, 15th Floor
Dallas, TX 75242
(214) 753-2325

1 (PROCEEDINGS BEGAN AT 9:55 AM.)

2 COURT SECURITY OFFICER: All rise.

3 The United States District Court for the Northern
4 District of Texas is now in session. The Honorable United States
5 District Judge Barbara M.G. Lynn is presiding.

6 THE COURT: Be seated, please.

7 Happy birthday, Robert.

8 COURT SECURITY OFFICER: Thank you.

9 THE COURT: Mr. Crawford here is 29 again this year.

10 All right. Good morning, everyone.

11 The Court has set a hearing on various pending motions.
12 We're going to begin with the Motion for Summary Judgment.

13 I want to make an observation before we get started.

14 I find the tone of the dialogue between counsel
15 extremely inappropriate and disappointing. This is a
16 hotly-contested case. I think I can surmise from what I've read
17 that the clients detest each other. That's not unusual in
18 litigation.

19 What is unusual is when lawyers reflect that they
20 detest each other. Just not good. Not good for you, not good
21 for me, not good for your clients. It results in excessive costs
22 and wear and tear on you.

23 So I'm not going to harp on it, but time to take a
24 breath. There are fine counsel in this case. You should not be
25 identifying with your clients' disputes. Lawyers, in my view,

1 are like gunslingers. And when the day's over, you retire to the
2 bar and have a drink with each other. And if clients direct you
3 otherwise that you have to take on their disdain for each other
4 as your disdain for your fellow counsel, you should resist that
5 with all your might.

6 So that's all I'm going to say about that.

7 All right. I want to talk about the Motions for
8 Summary Judgment. I am very concerned with the issue of
9 causation, so I want to talk about that.

10 We're just going to go through what we need to go
11 through for the Court to decide it. This case is in the category
12 on my docket of ridiculous quantities of paper that have been
13 filed. I don't have everything in here, but it's taking up an
14 entire shelf. It's unrealistic to think that a court can review
15 the thousands and thousands and thousands of documents that you
16 all have filed. I've done the best I can. But I want to begin
17 with causation because I think there are serious problems with
18 causation in the case. So I want to begin by talking to
19 Plaintiff's counsel about caution.

20 So come on up, Mr. Muckenfuss.

21 MR. MUCKENFUSS: Thank you, Your Honor. Your Honor,
22 would you prefer I keep my mask on?

23 THE COURT: When you're standing at the lectern, if
24 you've been vaccinated, you can take your mask off. If you
25 haven't been vaccinated, keep your mask on.

1 MR. MUCKENFUSS: Thank you, Your Honor.

2 THE COURT: All right. So let's cover a couple of
3 issues.

4 If this is defamation, *per se*, then your position will
5 be you don't need to prove causation or damages; that damages are
6 presumed.

7 MR. MUCKENFUSS: That's correct, Your Honor.

8 THE COURT: All right. Do you have any other concepts
9 like that that would save your other causes of action if you
10 cannot prove causation?

11 MR. MUCKENFUSS: Yes, Your Honor.

12 So just as a general principle, as Your Honor knows,
13 there -- there are general damages and special damages in terms
14 of -- of defamation. So for -- In the context of general
15 damages, we do have a claim for reputational harm in the case.

16 THE COURT: Okay. I don't know if you heard my
17 question. For your other causes of actions, not defamation.

18 MR. MUCKENFUSS: Oh, I'm sorry, Your Honor.

19 THE COURT: Do you have a theory like defamation, *per*
20 *se*, that would save your claims if you could not prove causation?

21 MR. MUCKENFUSS: My apologies, Your Honor. No, there
22 would be not be a similar --

23 THE COURT: Okay.

24 MR. MUCKENFUSS: -- doctrine for the other.

25 THE COURT: All right. Now go back and finish what you

1 were saying.

2 MR. MUCKENFUSS: Thank you, Your Honor.

3 So for the defamation claim, Your Honor, the --
4 obviously, there are general damages and special damages for
5 defamation in Texas.

6 With regard to general damages which relate to
7 reputational harm, things of that sort, we do have a claim for
8 reputational harm in the case. So for general damages under
9 Texas law, we would be required to, at this stage, to have
10 evidence of reputational harm. The record is replete with --
11 with that evidence.

12 For example, two of the 30(b)(6) witnesses, Mr. Boyle
13 and Mr. Brinckman, testified in the case that following the
14 statements, that -- at issue in this case, that their business
15 dropped off dramatically. They also lost school district
16 customers specifically. Mr. Boyle testified as to that.

17 There's also evidence in the record, Your Honor, as it
18 relates to a specific school district, after the statements were
19 made, specifically the Open Letter which is one of the
20 statements, turned off GPS' products which is -- This is the
21 Newark School District in California. They're in Southern
22 California. So that -- that is evidence. In addition, there are
23 other examples of this in the record, but there's direct evidence
24 of reputational harm in terms of after the statements were made.

25 And I would note, Your Honor, it's important in the

1 context of the chronology. These statements were made in a very
2 tight timeline. So basically from February of 2021 through
3 basically May of 2021, there were a series of statements, tweets,
4 other statements and presentations that were made. So that it's
5 a very compressed timeframe. These statements are not being made
6 over a couple of years or something like that.

7 So in terms of the context of reputational harm, it
8 came quickly, but there was direct evidence of after those
9 statements were made, that there was reputational harm.

10 The other element of the other type of damage ---

11 THE COURT: Well, reputational harm is a different
12 concept from pecuniary harm.

13 MR. MUCKENFUSS: It is. Yes, Your Honor.

14 THE COURT: Okay. So what's the reputational harm?

15 MR. MUCKENFUSS: The reputational harm ---

16 THE COURT: Let me -- Let me clarify my question and
17 then I'll let you answer. Because it doesn't seem to me that --
18 your just telling me about, "Oh, we lost this sale; we lost this
19 sale; they turned off our product in Newark," that this is
20 reputational harm. Reputational harm is the perception of GPS in
21 the world in which it operated was negative so that customers
22 would not deal with it.

23 MR. MUCKENFUSS: Yes, Your Honor.

24 THE COURT: And where's the evidence of that?

25 MR. MUCKENFUSS: So the evidence, Your Honor, I think

1 it -- obviously, it overlaps with the evidence of pecuniary harm
2 or special damages.

3 For example, take the school district, the Newark
4 School District. That is not specifically pecuniary harm, but
5 that is a customer. It was a customer that bought the product
6 that turned off the technology after the statements were made;
7 specifically, the Open Letter. So that is direct evidence that
8 in the market, in the -- in the world, after those statements
9 were made, there was a specific school district that took those
10 statements, did not want to deal, obviously, with GPS, turned off
11 the technology, turned off the products. So after a search,
12 Your Honor, that is direct evidence of the impact on the
13 reputation of GPS in the market.

14 There are -- There are other parts of the testimony of
15 Mr. Boyle and Mr. Brinckman that relate to that. Certainly some
16 of it overlaps with pecuniary harm when you have customers that
17 don't want to deal with GPS, that don't want to buy their
18 product. It certainly overlaps with the reputational harm as it
19 does with special damages.

20 But you are -- I concede, Your Honor, obviously,
21 pecuniary harm goes to special damages. It goes to business
22 disparagement, but the reputational harm is a broader -- broader
23 element in terms of what the courts have recognized, if there's
24 some evidence in the market. And certainly after these tweets
25 were made, there are -- in the record there are a number of

1 statements and other -- There are -- There are news stories.
2 There are media reports of -- of these statements that are
3 negative to GPS. There are specific customers that refuse to
4 deal with GPS, that refuse to buy its product.

5 THE COURT: Okay. Let me -- Let me interrupt you
6 there.

7 Am I correct that there is no evidence -- I presume no
8 depositions were taken -- of any actual customer or prospective
9 customer about how these statements impacted, if at all, their
10 decision-making?

11 MR. MUCKENFUSS: There -- There was no deposition of an
12 end user or customer. That is correct, Your Honor.

13 THE COURT: Or a prospect.

14 MR. MUCKENFUSS: Or a prospect customer.

15 THE COURT: So that all the testimony that you're
16 offering me in connection with any causation/damages from these
17 statements is from Mr. Boyd and Mr. Brinckman.

18 MR. MUCKENFUSS: Well, there is -- That -- That's
19 correct. Those were the two 30(b)(6) witnesses, Your Honor,
20 Mr. Boyle and Mr. Brinckman. We, obviously, have the affidavit
21 of Mr. Boyd that was submitted with summary judgment. Mr. Boyd
22 was a Sales Director at GPS.

23 THE COURT: Yeah. I know who he was.

24 MR. MUCKENFUSS: Thank you, Your Honor.

25 THE COURT: So explain to me, because I don't

1 understand it: You've argued this is not being offered for the
2 truth. It seems like hearsay to me, but you're saying it's not
3 being offered for the truth. That is the litany that I hear
4 every single time there's a hearsay objection. And sometimes
5 it's not offered for the truth, but in this case it seems obvious
6 to me it is offered for the truth. The truth being the client
7 either stopped dealing with GPS or decided not to deal with GPS,
8 and you present that through Mr. Boyd and Mr. Brinckman who are
9 reporting what customers said to them. And the best evidence of
10 what customers were thinking is customers.

11 So why is that not hearsay that's inadmissible?

12 MR. MUCKENFUSS: So, Your Honor, the -- the statement
13 -- So, first of all, I'll back up.

14 THE COURT: Okay. Let me ask everyone in the audience:
15 You're welcome to be here. Keep your thoughts about anything I
16 say or counsel does to yourself. No head nodding, no
17 questionable looking. Just keep it all to yourself. If you have
18 to have a reaction, go out in the hall.

19 Okay.

20 MR. MUCKENFUSS: Thank you, Your Honor.

21 So just to back up, Mr. Brinckman testified -- So I'll
22 get to the statements by, for example, with Carrier, for example.

23 Mr. Brinckman testified in his deposition that Carrier
24 ceased doing business with them shortly after the Open Letter was
25 published. The -- So there is a letter from Carrier that was

1 sent to Mr. Brinckman. The letter terminates the contract, the
2 relationship with GPS.

3 Your Honor, I don't -- With that -- That -- That letter
4 which goes to the fact that Carrier terminated the business would
5 not be hearsay. It doesn't go for the truth of the matter
6 asserted in the sense of, obviously, as it relates to GPS'
7 products, whether they work or not. It was a -- It was in the
8 context of the contractual relationship with Carrier. It
9 certainly is a business record in the sense that it was a
10 transmission of the cancellation of the contract with GPS.

11 THE COURT: Okay. What's the appendix number?

12 I'm sorry. Is it Mr. Boyd's declaration, Appendix
13 1810? Where's -- Which is the letter?

14 Paragraph 11 of this affidavit of Mr. Boyd sets out a
15 number of things that happened with other customers. And
16 Paragraph 10 just says, "I am aware that Carrier employee
17 Chris Opie informed GPS that Carrier was canceling an agreement
18 with GPS," quote, "because of Zaatri's statements," closed
19 quote.

20 Is there a letter that says that?

21 MR. MUCKENFUSS: So there is a -- No, there is not a
22 letter that states "because of Zaatri's statements."

23 THE COURT: Okay. So what they're talking about here
24 is the "because."

25 MR. MUCKENFUSS: Yes, Your Honor.

1 THE COURT: Clearly, you can establish through the
2 testimony of representatives of GPS that Client A canceled, that
3 Client -- that potential Client B never went forward. Those
4 facts you can establish.

5 What I started this conversation with is my concern
6 about causation. So I don't -- I don't know why -- I'm not
7 questioning this strategy of nobody deposing any of these people
8 who actually know why they canceled or didn't go forward, but the
9 fact is you didn't. So you've got to live with what's in the
10 record about why they canceled or didn't go forward.

11 And other than hearsay, what have you got?

12 MR. MUCKENFUSS: So, Your Honor, to address hearsay,
13 this would fall under the state of mind in terms of an exception
14 to hearsay. I don't believe it would go to the truth of the
15 matter asserted of what they stated. It goes to what, in this
16 case, Carrier's state of mind would be as to why they're
17 canceling the contract.

18 THE COURT: I'm not buying that. I'm sorry. You can
19 give it your best shot because I'm not buying it. If that were
20 the way the hearsay rule worked, we wouldn't have a hearsay rule.

21 The purpose of this evidence from Mr. Boyd -- There's
22 some evidence to this effect from Mr. Brinckman, but let's talk
23 about Mr. Boyd because I've got his affidavit open.

24 Mr. Boyd is saying to the Court -- And I'm -- I'm using
25 the affidavit even though it's objected to for this purpose. I'm

1 going to refer to the affidavit. He is saying what customers
2 said was the reason they canceled.

3 For you to prevail on causation, you have to convince
4 the jury that customers canceled or did not go forward because of
5 these statements and that's why you're offering the evidence. It
6 isn't the state of mind about Carrier that's relevant. It's -- I
7 mean it is the -- It is their state of mind, but it's not an
8 exception to the hearsay rule. It is the essence of why they did
9 not go forward, and you've got to put that forward in an
10 admissible way. I don't think the "state of mind" exception
11 about the speaker is the essence of what the "state of mind"
12 exception would cover. "State of mind" exception might cover why
13 Mr. Boyd took certain action because of what he heard, but that's
14 not the relevant issue. The relevant issue is: Why did these
15 people not go forward? And you're presenting what they allegedly
16 said to Mr. Boyd, and I'm very concerned that that violates the
17 hearsay rule.

18 MR. MUCKENFUSS: So, Your Honor, just to back up a
19 second, too. So the Defendants don't -- There's no case law
20 that's cited that requires the plaintiff in a defamation case to
21 only have direct evidence of, say, a customer actually saying, "I
22 canceled" or "I didn't do something because of these statements."
23 There is -- There is plenty of case law that we cited and go
24 through this case law both on the Lanham Act, also under the
25 defamation claim that is absolutely to survive summary judgment,

1 go to trial. A plaintiff can have circumstantial evidence of
2 damages. In this case, it's undisputed in the chronology of what
3 happened with these statements. It's undisputed -- Putting aside
4 Mr. Boyd's statement about Carrier's statement, it is in the
5 record that Carrier, within days -- within days of the Open
6 Letter being published, which -- which is separate from any
7 statement that Carrier would make, that Carrier canceled the
8 contract.

9 THE COURT: Okay. So let me -- I'm going to -- You can
10 come back. I'm never going to cut you off and not let you
11 return, so make a note in your head where you were.

12 So let's assume we didn't have Mr. Boyd saying what
13 Carrier, Chris Opie said; that what we had was statements, action
14 and that's it. So if the record was GPS had a contract with
15 Carrier, Open Letter, Carrier cancels, can that go to the jury?
16 You're telling me that's sufficient evidence of the statements
17 having caused Carrier to cancel the contract with nothing else?

18 MR. MUCKENFUSS: Yes, Your Honor. And I would submit
19 that it's not nothing else in the sense of what's happening.

20 So Carrier signed this contract well before, in 2020.
21 So Carrier signs the contract with GPS, I believe, in November of
22 2020, around that time in the Fall of 2020.

23 As -- As you go through late 2020 into 2021, obviously,
24 there's a lot of evidence in terms of what was happening with the
25 statements. So in February and into March of 2021, Dr. Zaatari

1 starts making her public statements. The Open Letter is
2 published on April -- I think April 12th. Around that time,
3 Your Honor, the Open Letter is published. Within five days, I
4 believe, or within less than a week, Carrier sends a
5 communication to GPS canceling the contract.

6 So, yes, I think in the -- There is no case -- The
7 cases that I reviewed that we've looked at, there is no case that
8 requires -- Most of these cases, to be honest, are around
9 circumstantial evidence. And there's a case we cite, the Lanham
10 Act case where the court -- where the court states that
11 circumstantial evidence is permissible.

12 THE COURT: Okay. But there has to be some connection.
13 I understand the difference between direct and circumstantial
14 evidence. But in the example that you and I are discussing,
15 there isn't even any evidence that Carrier saw the letter except
16 for the hearsay statement of Mr. Boyd.

17 So if the circumstances are as I just posited them to
18 you where I have a contract, statement, action, the jury is
19 supposed to assume from what you're calling "circumstantial
20 evidence" -- I'm not accepting that characterization of it --
21 that Carrier must have seen the Open Letter and, as a result of
22 seeing the Open Letter, Carrier decided not to go forward, with
23 zero evidence that they saw the letter or made that decision
24 because of it?

25 MR. MUCKENFUSS: Well, Your Honor, again, I think the

1 -- Mr. Brinckman did testify as to the timing of the letter. I
2 understand that there is no statement from Carrier as to
3 reviewing the letter and -- and canceling it because of the
4 letter. But the cases that we cite in -- in the brief, there is
5 no case where there's, you know, sort of that perfect testimony
6 where that customer, the person says, "I didn't do something,"
7 or, "I didn't buy the product because of the statement."

8 In fact, in many cases, the Lanham Act cases, for
9 example, there could be public statements and consumers stopped
10 buying a particular product. It's certainly permissible from
11 the -- from the -- from the chronology of what happened in
12 certainly the condensed time of these statements, with no other
13 explanation certainly. And the jury's entitled to look at, "Here
14 are the arguments from the Defendants," and, obviously, consider
15 all of the -- all of the facts that are happening in terms of the
16 market, other statements, but it would be extraordinary and I
17 think very difficult for a plaintiff to ever go to the jury if it
18 were required that -- that every single customer that it was
19 claiming ---

20 THE COURT: How about any customer? This isn't a case
21 of every single customer. I'm looking for any customer who says,
22 (A) "I read the letter;" (B) "I made a decision because of the
23 letter." I don't have either of those. I have no direct or
24 circumstantial evidence that the customer saw the letter or
25 considered the letter significant except for what Mr. Boyd and

1 Mr. Brinckman say.

2 MR. MUCKENFUSS: So there -- there is evidence. So
3 just to back up a little bit, too, the intent of the Open Letter,
4 for example, Your Honor, was to be transmitted to my client's
5 customers. So the Defendants admit and, in fact, there is
6 evidence throughout the case that -- and Dr. Zaatar published a
7 list of my client's customers and the intent -- and they followed
8 through with it -- they did transmit the letter to customers of
9 GPS. So I don't think it's ---

10 THE COURT: Who is "they" in your ---

11 MR. MUCKENFUSS: I'm sorry, Your Honor. Dr. Zaatar
12 and enVerid. So Dr. Zaatar, both through her tweets and in
13 e-mails with enVerid and on the first page of the Open Letter --
14 So the Open Letter, the intent of the Open Letter was to be
15 transmitted and directed to the school district customers that my
16 client had for the purpose of trying to convince them not to buy
17 my client's products. So the intent of these statements -- So
18 this is not case where, you know, you have somebody sort of
19 openly just say, "Joe Blow is a liar," right, and it's just sort
20 of in a vacuum and it's a defamation case. The -- It's
21 undisputed and Dr. Zaatar admitted that the intent of her
22 statements in the Open Letter was to be directed to GPS'
23 customers.

24 THE COURT: Okay. But is there evidence that they went
25 to their -- that the Open Letter went to the customers?

1 MR. MUCKENFUSS: There absolutely is evidence that the
2 Open Letter went to school districts, absolutely.

3 THE COURT: Okay. I'm assuming Carrier is not in the
4 category of "school district."

5 MR. MUCKENFUSS: No, the Carrier is not in the -- So
6 these are end users. Carrier, I would describe, as sort of a
7 rep; right?

8 So the way my customer -- I'm sorry. The way my client
9 sells this, it doesn't sell its product directly to the end user.
10 So companies like Carrier or companies like that will use or buy
11 my client's -- buy GPS' products, right, and install it for the
12 end user. So companies like GPS were very important to my client
13 in terms of using that technology to employ in schools or office
14 buildings or wherever it might be.

15 THE COURT: Companies like "Carrier"? Is that what you
16 meant? You said "GPS."

17 MR. MUCKENFUSS: I'm sorry, like Carrier.

18 THE COURT: Okay.

19 MR. MUCKENFUSS: But those were -- I call it sort of
20 the middle man or the, you know, the rep would do that.

21 So, Your Honor, the -- the -- I guess my point is --
22 And there is evidence in the record in terms of -- of reacting to
23 these statements. The Newark School District in California, for
24 example, there is direct evidence in the record that Newark --
25 Newark School District, reacting to the Open Letter, turned off

1 GPS' technology.

2 THE COURT: But that didn't cause any damages to it,
3 did it?

4 MR. MUCKENFUSS: Well, I was just addressing Your Honor
5 to ---

6 THE COURT: Yeah.

7 MR. MUCKENFUSS: Well, I mean I disagree. I think it's
8 evidence of reputational harm.

9 THE COURT: Okay.

10 MR. MUCKENFUSS: I go back to: There are two types of
11 damages. There's special damages and general damages. I -- I
12 understand the Court's questioning about special damages, what's
13 the evidence on certain pecuniary harm, but there is -- there is
14 plenty of evidence in the record as to the end users, like Newark
15 School District, and other schools and certainly other people,
16 obviously, in the public receiving the Open Letter.

17 I concede, Your Honor, there's no evidence specifically
18 of Carrier saying, "I got the Open Letter and read it."

19 Mr. Brinckman testified that -- because he was communicating with
20 Carrier. He doesn't talk about a statement that Carrier makes,
21 but he testifies in his deposition that when he's -- He's asked
22 about Carrier.

23 He says, "Let's go back to Carrier. Is it your
24 testimony today that GPS is not currently doing business with
25 Carrier?"

1 "That is correct."

2 "When you were doing business with Carrier, did it
3 actually keep the inventory products or did it buy for individual
4 projects?"

5 And he explains that, "Carrier is an OEM. They
6 canceled the agreement before we actually started executing it."

7 "Okay. So it never went forward."

8 "The agreement was signed but then it canceled shortly
9 thereafter."

10 Mr. Brinckman goes on to testify further about Carrier.

11 THE COURT: Excuse me just a moment. Stop. Stop for a
12 minute, and we'll come back to this.

13 Am I recalling correctly that the contract with Carrier
14 allowed Carrier to cancel?

15 MR. MUCKENFUSS: I'm sorry, Your Honor?

16 THE COURT: Did the contract permit Carrier to cancel
17 for any reason?

18 MR. MUCKENFUSS: No, Your Honor, --

19 THE COURT: Okay.

20 MR. MUCKENFUSS: -- it did not. It was -- It was -- It
21 was a contract executed in late 2020.

22 THE COURT: Okay. And did you take action with respect
23 to Carrier canceling?

24 MR. MUCKENFUSS: No, Your Honor. I think the testimony
25 -- I think the testimony from Mr. Brinckman, I mean you had a

1 situation, obviously, with my client. It's sort of a delicate
2 business situation. They want to continue to do or try to do
3 business with Carrier in the future. But, no, they did not take
4 any legal action against Carrier.

5 THE COURT: Well, your client knows the way to the
6 courthouse.

7 MR. MUCKENFUSS: I'm sorry?

8 THE COURT: Your client knows the way to the
9 courthouse.

10 MR. MUCKENFUSS: Yes, Your Honor.

11 THE COURT: The customers in Paragraph 11, Bard HVAC,
12 S&P, JCI, Daikin, Greenheck, Berner -- I know my court reporter
13 is hating me now -- Nailor Industries and ABM -- That's at
14 Appendix 1811, and Laura will provide all those spellings to you,
15 Debbie.

16 Do I have any evidence with respect to any of them and
17 their decision-making other than Mr. Boyd or Mr. Brinckman saying
18 what they said?

19 MR. MUCKENFUSS: No, Your Honor. Other than what is in
20 Mr. Boyd's affidavit as to those particular -- You do have
21 Mr. Brinckman's testimony in general about the damages to GPS.

22 And if I may, Your Honor, just to go back to the
23 evidence regarding the letter and where it was directed to,
24 Mr. Brinckman testified ---

25 THE COURT: I'm going to assume that when you're

1 referring to "the letter," you mean the Open Letter?

2 MR. MUCKENFUSS: I -- I apologize.

3 THE COURT: No. That's okay. I'm just clarifying for
4 the record.

5 MR. MUCKENFUSS: Yes, the Open Letter.

6 THE COURT: The Open Letter is dated April 12th, 2021.

7 MR. MUCKENFUSS: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. MUCKENFUSS: Mr. Brinckman -- If I may, Your Honor,
10 I'll read briefly Mr. Brinckman's testimony.

11 THE COURT: Okay.

12 MR. MUCKENFUSS: "Mr. Brinckman, what is your
13 understanding of who Marwa Zaatar directed the letter to?"

14 "It was directed to our customer base."

15 "It was -- Was there a specific customer base she
16 directed the letter to?"

17 "Predominantly schools."

18 "And what is your understanding of why she directed the
19 Open Letter to your customers?"

20 "To get them to not purchase GPS or turn it off."

21 "Do you think she was successful in her efforts to do
22 that?"

23 "Yeah. Our financial results demonstrate that."

24 So I -- Going back, Your Honor, to the circumstantial
25 evidence of harm in this case, so just the school districts were

1 the primary end user/customer of my client's product through 2020
2 and 2021. You may have read that in the brief or in the
3 testimony. So, obviously, they comprise the majority of my
4 client's sales.

5 THE COURT: Are they any of the customers and potential
6 customers that I just read out?

7 MR. MUCKENFUSS: Not -- Not with Mr. Boyd. I was
8 referring to Mr. Brinckman's testimony in general.

9 THE COURT: Okay. Okay. Did -- What is the evidence
10 of school districts that either canceled or did not contract with
11 GPS other than Newark?

12 MR. MUCKENFUSS: I'm sorry. Other than Newark?

13 THE COURT: Yes.

14 MR. MUCKENFUSS: So there were no -- there were other
15 -- There were no other schools. I mean, obviously, my client
16 doesn't -- There are schools that just never bought GPS' product,
17 never had a relationship with GPS.

18 There was a school district -- There's other school
19 districts, for example, in Atlanta, Your Honor -- I believe this
20 is in Mr. Brinckman's testimony; I would have to get the cite --
21 that never followed through with the purchase. Now, obviously,
22 this goes to the chronology. We -- We did not depose, obviously,
23 the Atlanta School District or those specific school districts,
24 but Mr. Brinckman testified specifically that the Open Letter --
25 and the Open Letter itself says it's intended for schools, and

1 it's -- I don't think the Defendants -- I don't think they
2 dispute that my client's business declined dramatically after
3 these statements were made.

4 And I would submit -- And the case law that we cited is
5 one with the Lanham Act defamation. That's sufficient
6 circumstantial evidence for the jury to decide whether the
7 decline in business, and certainly like with Newark School
8 District which is direct evidence of the impact of the
9 statement -- I understand -- I'm not stating, Your Honor, that
10 Newark School District, because they had already bought the
11 product, I understand that, but they are reacting in the public
12 to the -- to the statement and turning off the technology.

13 THE COURT: Well, you are surmising that is why they're
14 turning it off.

15 MR. MUCKENFUSS: I believe it was stated. So there was
16 a video published by the Newark School District which, I think,
17 is referenced in the testimony in which they referenced the Open
18 Letter. There was no other event that occurred.

19 THE COURT: Okay. You're going to give me that cite.
20 I'm not familiar with what you're telling me.

21 MR. MUCKENFUSS: Okay. We can look it up. But the
22 Newark School District is referenced in Mr. Brinckman's testimony
23 as to turning off the technology.

24 THE COURT: Okay. I'm trying to get you to direct me
25 to admissible evidence of causation and damages.

1 So the first question is: Who saw the letter?

2 The second question is: Why did they take action?

3 The Open Letter, as you point out, is directed to
4 School District Facility Managers and Administration Leadership,
5 and other professional organizations which, I assume, does not
6 include Carrier or S&P, JCI, Daikin, Greenheck, Berner, Nailor
7 and ABM. Is that right?

8 MR. MUCKENFUSS: Yes, Your Honor.

9 THE COURT: Okay. Let me come back to the Open Letter.
10 It's a little off the topic but since I have it in my hand, the
11 Open Letter is authored on its face by Dr. Zaatari and
12 Dr. Harmon.

13 MR. MUCKENFUSS: Yes, Your Honor.

14 THE COURT: Is that correct?

15 Have you sued Dr. Harmon?

16 MR. MUCKENFUSS: We have not.

17 THE COURT: What is the evidence that the Open Letter
18 would not have gone out as is if Dr. Zaatari had not signed it as
19 well?

20 MR. MUCKENFUSS: So the -- There is e-mail evidence --
21 There is e-mail evidence, Your Honor, in which Dr. Zaatari,
22 within enVerid, comes up with the idea of the Open Letter. And
23 the first mention of the Open Letter is an e-mail from
24 Dr. Zaatari to Dr. Harmon. It is true that Dr. Harmon helped
25 draft the Open Letter. However, he was -- I think there is

1 evidence in the record, and I don't really think it's disputed,
2 that it was Dr. Zaatari who wanted to write the Open Letter, who
3 recruited Dr. Harmon to help her write the Open Letter. So it
4 was -- It was without a doubt Dr. Zaatari's idea, and certainly
5 her motivation to write the Open Letter, to -- to send it to
6 school districts. And, again, our -- our -- our claim in this
7 case and the evidence and the e-mail evidence is that that
8 strategy was -- was concocted within enVerid and with
9 Dr. Zaatari. It was not with Dr. Harmon independent of
10 Dr. Zaatari.

11 THE COURT: Okay. What is false in this Open Letter?

12 MR. MUCKENFUSS: So there are numerous things that we
13 lay out in our brief that are false in the Open Letter.

14 Number one, she refers to -- And, again, I would go
15 back to the Texas cases, Your Honor, because she talks about
16 ionization at certain points in the Open Letter, you know,
17 generally. She also refers to NPBIs specifically in the Open
18 Letter.

19 THE COURT: Okay. Let me -- Let me stop you for a
20 minute --

21 MR. MUCKENFUSS: Sure.

22 THE COURT: -- and come back to this.

23 Do you dispute that certain kinds of ionization
24 techniques generate ozone which is harmful to humans?

25 MR. MUCKENFUSS: I'm sorry. Do I dispute that certain

1 ionization technologies produce ozone that are harmful to humans?
2 We dispute that there is any ionization technology. I don't
3 think -- First of all, I understand there are other ionization
4 technologies that produce ---

5 THE COURT: Yeah. I don't think that was a tough
6 question, but I can ask you a tough question.

7 MR. MUCKENFUSS: I know.

8 THE COURT: I'm starting with the easy questions.

9 MR. MUCKENFUSS: Yeah.

10 THE COURT: We'll get to the tough questions later.
11 This is a simple question.

12 Do you dispute that certain kinds of ionization
13 technologies generate ozone which is harmful to humans?

14 MR. MUCKENFUSS: We do dispute that.

15 THE COURT: Okay. So your position is that no
16 ionization technologies generate ozone or that ozone is harmful
17 to humans?

18 MR. MUCKENFUSS: So there's two parts of that question.
19 We dispute that it would be harmful to humans. We don't dispute
20 that certain ionization technologies produce ozone.

21 THE COURT: Okay. All right. So your dispute is with
22 the concept that generation of ozone can be harmful to humans.

23 MR. MUCKENFUSS: We are disputing the fact that in any
24 ionization technology that produces ozone would be harmful --
25 that there's evidence that it's harmful to humans. We don't

1 dispute that ozone, in general, at certain levels would be
2 harmful to humans; right? So I'm not -- We're not disputing that
3 concept.

4 THE COURT: Okay. So I want to go through this letter,
5 so you should have it in front of you. Page 1, five studies are
6 referenced in the third paragraph and then some of those again
7 referenced in the second line of that paragraph, along with
8 additional studies, 6, 7 and 8.

9 Do you dispute the accuracy of the description of what
10 those studies indicate?

11 MR. MUCKENFUSS: Yes, Your Honor.

12 THE COURT: Okay. What is the nature of that dispute?

13 MR. MUCKENFUSS: So in her deposition Dr. Zaatari
14 actually admitted that -- or referenced to one of the cites. The
15 Trane study was incorrectly cited in -- in her --

16 THE COURT: Right.

17 MR. MUCKENFUSS: -- in the paper for a proposition.

18 THE COURT: Yes.

19 MR. MUCKENFUSS: There's also -- So there is a section
20 I'm getting a copy of -- I'm sorry -- of the Open Letter.
21 There's a section in the Open Letter that talks about the impacts
22 on health.

23 THE COURT: Okay. Well, I want to do this page by
24 page --

25 MR. MUCKENFUSS: I'm sorry, Your Honor.

1 THE COURT: -- so you're not ahead of me. So one of
2 the studies, the Trane, T-R-A-N-E, study you claim is miscited.
3 So if we just took that one out, are the other references to the
4 studies that are in the third paragraph on Page 1 accurate?

5 MR. MUCKENFUSS: They are not accurate, Your Honor, as
6 it relates to my client's technology.

7 THE COURT: Okay. But it doesn't purport to be
8 referring to your client there, does it?

9 MR. MUCKENFUSS: Well -- So one of the studies,
10 Reference 1, which is the -- what's known as the "Illinois Tech
11 Study," does refer to my client's technology. We do intend that
12 her reference to that study in the -- in this paper is false in
13 terms of what she purports to use it for. For example, she
14 purports to use the Illinois Tech Study to state that my -- that
15 NPBI produces harmful levels of by-products. That is a -- That
16 is a false statement as it relates to that study.

17 THE COURT: Okay. What is the connection between the
18 Illinois Institute of Technology and Elsevier?

19 MR. MUCKENFUSS: And Elsevier? So Elsevier is the
20 publisher of the -- So Illinois Tech is a school where the study
21 occurred.

22 THE COURT: Okay.

23 MR. MUCKENFUSS: Elsevier is a published -- scientific
24 publisher that published that study.

25 THE COURT: Okay. Have you sued them?

1 MR. MUCKENFUSS: We have, correct.

2 THE COURT: And you sued Elsevier, the publisher. And
3 Illinois Institute of Technology?

4 MR. MUCKENFUSS: Not the -- Not the school. So the
5 school is just where the study occurred. Elsevier published the
6 study.

7 THE COURT: Okay. And is it your position that the
8 study is false?

9 MR. MUCKENFUSS: It is.

10 THE COURT: Okay. And what is the evidence that the
11 Defendants knew this study was false?

12 MR. MUCKENFUSS: So the -- Well, first of all, when I
13 deposed Dr. Zaatar, she admitted that, for example, there's data
14 in the study that is -- on the face of the study is false. So
15 there -- there is reported data in the study, in what's called
16 the "Supplementary Data" of the study, that is -- does not
17 support what the study purports to say which is -- For example,
18 the study purports to conclude that acetone increased with the
19 use of ionization. The data that's actually within the study
20 does not support that conclusion in the study.

21 So that the source of our claim against Elsevier
22 relates to the fraudulent data. And, again, I would note,
23 Your Honor, after we sued Elsevier, they -- only after we sued
24 Elsevier, they -- they attempted to correct that issue within the
25 report. We still contend that even by their own conclusory

1 correction of the incorrect presentation or the inconsistent
2 presentation of the data, that it's still false, and that that's
3 an ongoing case.

4 But before they corrected the study, on the face of the
5 study -- And I deposed one of the lead authors in the case who
6 admitted that the data reported in the supplementary data did not
7 support the conclusion that Dr. Zaatar tries to use it for which
8 is that it increases harmful levels of by-products.

9 THE COURT: Okay. What else is false about the letter?

10 MR. MUCKENFUSS: So, Your Honor, I would note there is
11 a reference -- For example, we've talked about the Trane study,
12 using the Trane study for -- to support the statement that NPBI
13 or ionization produces harmful levels of by-products. That is a
14 false statement.

15 On Page -- I believe it's the third page of the Open
16 Letter, there's a reference to impact on health. One of the
17 strategies of the Open Letter was to conflate technologies, and I
18 would -- I would submit, Your Honor, this is an important point
19 because it's intentional. When Dr. Zaatar's making statements,
20 she refers to NPBI and then she will refer to ionization in
21 general.

22 Under the -- Under the *Klentzman* case and the *Levine*
23 case, Texas Supreme Court cases, there is the concept that
24 when -- when the defendant makes references to a group, and it's
25 reasonable that these references are directed or they would be

1 associated with the plaintiff, the defendant does not have to
2 name the plaintiff by name.

3 THE COURT: Yeah. I know that law. I don't need to be
4 schooled on that. I'm aware of that.

5 MR. MUCKENFUSS: Apologies, Your Honor. I just wanted
6 to make ---

7 THE COURT: No, no. I wasn't being offended. I just
8 -- You don't need to waste your time on that.

9 MR. MUCKENFUSS: Thank you, Your Honor.

10 THE COURT: I -- I agree with you on that.

11 MR. MUCKENFUSS: Yeah. And I just -- I just wanted to
12 preface that when I'm making this statement.

13 So it is important, for example, that when she says
14 electronic air cleaners' ionisers produce ozone, that is not
15 correct as it relates to my client's products, in terms of my
16 client's products.

17 THE COURT: But there are a category -- Let me say that
18 differently. Ionization is a large category of what your client
19 that uses needlepoint bipolar ionization, NPBI, which is a
20 sub-category of ionization techniques, and your client has been
21 critical of other businesses that use different ionization
22 techniques. Is that correct?

23 MR. MUCKENFUSS: Well, my client has been -- I think
24 not in the sense of making -- So my client, Your Honor,
25 obviously, has received zero ozone certification for a reason

1 under UL 2998. So, yes, I think that is a distinction of their
2 product that makes it marketable. That was -- That was an area,
3 regardless -- even though my client has zero ozone emission for
4 its product, Dr. Zaatari, nevertheless, and even in her tweets,
5 aside from the Open Letter -- I know we're on the Open Letter. I
6 don't mean to leave that document, but she intentionally
7 conflates and confuses the technologies.

8 But, yes, there absolutely are ionization technologies
9 that don't measure up to my client's technology in terms of
10 ozone, in terms of a lot of different things, but Dr. Zaatari
11 never distinguishes or attempts to note that my client's
12 technology is, in fact, different, for example, with ozone. It's
13 the exact opposite. She -- She lumps NPBI in with the group that
14 -- where she makes these statements. So these statements are, in
15 fact, false as it relates to GPS' technology.

16 THE COURT: When did GPS -- If they did, when did GPS
17 offer Ms. -- Dr. Zaatari a seat on the GPS Science Advisory
18 Board?

19 MR. MUCKENFUSS: When did -- So this is an interesting
20 e-mail. Mr. Brinckman, the CEO, I think you're referencing, sent
21 -- reached out to Dr. Zaatari and to be quite honest, Your Honor,
22 I think he testified to this. He was simply trying to --
23 Obviously, it got very contentious. He didn't offer her a job as
24 it's represented. What he states in the e-mail is he invites her
25 to come to GPS to talk with them to see the technology, to

1 understand. Again, my client's efforts throughout was to make
2 the point that they should not be lumped in with other ionization
3 technologies. He was reaching out to her to make that offer to
4 "come talk with us," to look at the lab.

5 THE COURT: When? When? That's all I asked you.

6 MR. MUCKENFUSS: I'm sorry, Your Honor. It was in
7 March, 2021. I'm sorry, Your Honor.

8 THE COURT: All right.

9 MR. MUCKENFUSS: And so it was -- And I don't know if
10 Your Honor had another question about that.

11 THE COURT: I didn't.

12 MR. MUCKENFUSS: Okay.

13 THE COURT: Okay. I'm going to pick on the other side
14 here in a moment.

15 MR. MUCKENFUSS: Thank you, Your Honor.

16 THE COURT: Have a cup of water or something.

17 I want to talk about causation -- Excuse me. I want to
18 talk about agency and responsibility. So give me your best shot
19 about agency and conspiracy with reference to enVerid.

20 So enVerid -- Is that the correct pronunciation?

21 No. I'm still with you.

22 MR. MUCKENFUSS: Oh, you're still on me.

23 THE COURT: Yes. Is that the correct pronunciation?

24 MR. MUCKENFUSS: I thought you were moving on.

25 THE COURT: I'm going to. I just have a last question

1 I want to ask you.

2 "EnVerid," is that correct?

3 MR. REED: EnVerid, yes, Your Honor.

4 THE COURT: Okay. Give me your best shot about
5 conspiracy with the other Defendants and agency. You concede
6 that there is an agreement between Dr. Zaatari and enVerid for
7 the period of time when the statements were made, correct? You
8 concede that?

9 MR. MUCKENFUSS: Yes, Your Honor.

10 THE COURT: Okay. So give me your best shot about why
11 enVerid is responsible for what Dr. Zaatari said.

12 MR. MUCKENFUSS: Yes, Your Honor. So there are two
13 theories: Agency and civil conspiracy. I'll start -- I'll start
14 with civil conspiracy, and I will -- I will concede to the Court:
15 I believe that conspiracy is probably the stronger argument here,
16 if I'm understanding the -- Your Honor's point about the advisory
17 agreement, but I still think there is enough evidence on agency.
18 So for civil conspiracy and, again, I -- if Your Honor would
19 like, I can repeat the elements of conspiracy and sort of go
20 through the facts.

21 THE COURT: No thanks.

22 MR. MUCKENFUSS: Understood, Your Honor. I wanted to
23 make sure. I didn't want to go back down that road.

24 So I think if you look at the evidence, and there's
25 really a mountain of e-mails and I can go through specifics, but

1 for every -- for every specific act that we complain about, this
2 was strategized with really the CEO at enVerid, Mr. Weeks, and
3 with others at enVerid. So, for example, there is the -- what I
4 call the "bipolar backlash e-mail," Your Honor, and you may not
5 -- that may not ring a bell.

6 THE COURT: Yes, it does.

7 MR. MUCKENFUSS: Okay. Thank you, Your Honor.

8 So the bipolar backlash e-mail was an e-mail from
9 Heather Robb, enVerid -- someone who -- she was in charge of
10 enVerid's social media. And so this was a strategy that was
11 developed within enVerid to specifically go after GPS. And we --
12 There's the e-mail from Mr. Weeks where he basically ---

13 THE COURT: Can you give me a reference number on that,
14 please?

15 MR. MUCKENFUSS: Yes. I apologize, Your Honor. I'll
16 get the reference.

17 THE COURT: Okay. All right. Go ahead. Tell me when
18 you get it.

19 MR. MUCKENFUSS: Thank you, Your Honor. So we'll get
20 that reference.

21 There's also the reference from Mr. Weeks that he was
22 the CEO, the President of enVerid, where he -- there's this
23 e-mail where he says, "We -- We're getting our" -- So the
24 Appendix 568 is for that particular e-mail, the bipolar backlash
25 e-mail, Your Honor.

1 THE COURT: Okay.

2 MR. MUCKENFUSS: There is the e-mail where Mr. Weeks
3 states that -- basically that GPS is eating their lunch in terms
4 of the market and states that they have to come up with a plan to
5 go after GPS. And one of -- one of his ideas in his e-mail is to
6 basically say that GPS' technology produces harmful by-products.
7 And this was -- this was actually in August of 2020, earlier than
8 the March, 2021, but it -- it goes back to that timeframe.

9 If you look at the timeline, Your Honor, in terms of
10 how this develops within enVerid, it was -- it starts with
11 enVerid. It was very specific with enVerid.

12 So Mr. Weeks references the fact that they have to come
13 up with something to go after GPS with because GPS is eating
14 their lunch. What he means by that, and it's in the e-mails,
15 he's frustrated with the fact that GPS is selling this product
16 because it has zero ozone emission. It's certified under
17 UL 2998, and so they can't really compete with the product. In
18 fact, there are e-mails where they acknowledge that, you know,
19 GPS' products work and that they are a zero ozone emission.

20 These e-mails are with Dr. Zaatari who at the time is
21 an advisor. So she has her advisory agreement with enVerid, but
22 there are scores of e-mails where -- and there's another e-mail
23 where Mr. Weeks lays out the strategy, basically talks about how
24 they need to go after GPS publicly, and ultimately it culminates
25 in Dr. Zaatari tweeting out and using social media which enVerid

1 specifically encourages and directs Dr. Zaatari.

2 There's an e-mail with Heather Robb, Your Honor, where
3 she -- she is basically stating to Dr. Zaatari that they look
4 forward to her or expect her to tweet out something that was
5 happening negative or that they perceive they could tweet out
6 negative about GPS.

7 THE COURT: Okay. But what -- what is the evidence to
8 the extent -- Just to assume for the moment that what Dr. Zaatari
9 was saying was false, where is the evidence that enVerid knew or
10 encouraged Dr. Zaatari to put out false information?

11 MR. MUCKENFUSS: So, for example, Heather Robb, who is
12 the Director, and I can get this ---

13 THE COURT: I have her e-mail of March 11th, 2021. If
14 you want to direct me to something else, there's a series of
15 correspondence going back to March 2nd.

16 MR. MUCKENFUSS: Yes, Your Honor. So there --
17 Obviously, there are a number of e-mails that I referenced with
18 Mr. Weeks where he is in the e-mails laying out the strategy.

19 THE COURT: Okay. Can you -- When you come back up,
20 give me the whole list of those.

21 MR. MUCKENFUSS: Yes, Your Honor.

22 THE COURT: Or pass an e-mail up to my law clerk so I
23 can look that up.

24 MR. MUCKENFUSS: I can -- I can do that. Yes,
25 Your Honor.

1 THE COURT: All right. Okay. I'm going to give you a
2 break.

3 MR. MUCKENFUSS: I'm sorry, Your Honor?

4 THE COURT: I'm going to give you a break.

5 MR. MUCKENFUSS: Okay. Thank you, Your Honor.

6 THE COURT: Thank you.

7 All right. I don't know who's going to argue next. I
8 don't care.

9 MR. MASSO: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. MASSO: Jadd Masso for the Defendants,
12 Marwa Zaatari and D Zine. I know that Mr. Reed, on behalf of
13 enVerid, may have additional comments. They had a Motion for
14 Summary Judgment as well, but I'm happy to address certainly the
15 causation and damages issues and anything else from our motion
16 that Your Honor has questions about.

17 THE COURT: Okay. So you could have taken the
18 depositions of the customers, too. Why didn't you?

19 MR. MASSO: Because it's not our burden.

20 THE COURT: Okay.

21 MR. MASSO: It's their burden -- I mean their burden to
22 present evidence of causation and damages. They have the
23 capability to prove it but they -- Well, if there is evidence
24 that exists, certainly they had the capability to gather it.
25 Instead, they decided to rely on statements of their own that a

1 contract was terminated after statements were made or something
2 like that which is not evidence of causation.

3 THE COURT: Okay. Is that not circumstantial evidence
4 of causation? Timing, statement made, contract, statement made,
5 contract canceled?

6 MR. MASSO: I think they got to do more than that.
7 Just because Event 1 occurs and then Event 2 occurs, they haven't
8 given us a single case. I mean their entire argument on
9 causation is a single paragraph on Page 46 of their response.
10 They don't offer us anything like that to say, "Oh, well, it can
11 be circumstantial, and the fact that Event 2 followed Event 1 is
12 circumstantial evidence."

13 THE COURT: Does the contract permit Carrier to cancel
14 for -- without cause?

15 MR. MASSO: The contract, I believe -- Whether it needs
16 to be terminated is even a question itself. It's a Memorandum of
17 Understanding that says they have a goal of selling 20 million
18 dollars' worth of products. There's no obligation to do
19 anything.

20 THE COURT: Okay. Let's talk about defamation, per se.
21 Why isn't this defamation, per se?

22 MR. MASSO: Because ---

23 THE COURT: If it's defamatory. For the sake of my
24 question, I'm assuming it's defamatory.

25 MR. MASSO: It is not defamatory, per se, because all

1 of these statements deal with the safety efficacy of the product
2 itself. *Innovative Block*, of course, is the Texas Supreme Court
3 case that gives us this standard. So long as we are talking
4 about the product, it is about the product, it is not defamation,
5 per se. It is not about the character or the reputation of the
6 business.

7 THE COURT: Well, in effect, it is that GPS is fudging
8 its testing results. Either it doesn't have any tests at all and
9 it's misrepresenting that it does or it's fudging its test
10 results in terms of the details of the testing so that the
11 results will be misleading and inaccurate. Doesn't that, in
12 effect, accuse GPS of fraudulent behavior?

13 MR. MASSO: On this issue, I think we have to look at
14 the statements themselves. There are statements where GPS is
15 mentioned. There are statements where -- I mean in those --
16 There were 29 statements and now there's 27. They've conceded
17 two. But if we look at ---

18 THE COURT: Which two?

19 MR. MASSO: No. 3 and No. 9.

20 THE COURT: I don't think they have.

21 Have you, Mr. Muckenfuss? Conceding 3 and 9?

22 MR. MUCKENFUSS: No, Your Honor.

23 THE COURT: 3 and 9, back at you.

24 MR. MASSO: Very well.

25 THE COURT: I would have considered it a major victory

1 if 2 of the 29 had, but no such luck.

2 MR. MASSO: As far as the number of statements we're
3 dealing with, we're back to 29. If we look at those and say,
4 "Okay, which one of these should be construed as impugning the
5 character of the manufacturer," if there are any, I mean I know
6 that there's a couple that used the word "cheating." I looked at
7 those this morning. They don't mention GPS. They don't mention
8 NPBI. They talk about ionisers because ionisers cheat in the way
9 they -- the way they can be tested or something like that. But,
10 you know, this almost gets us back to causation, of course. But
11 looking at these 29 statements, where is their character impugned
12 beyond just criticizing the product? Criticizing the product and
13 saying that it doesn't work, that it doesn't meet the things that
14 people say about it, that it doesn't really clean the air as much
15 as people may think it does, that's an issue with the product.

16 It's just like *Innovative Block* saying, "Oh, they're
17 using, you know, substandard materials. They're using bad
18 aggregate." That's the same thing we saw in *Innovative Block*.
19 You're impugning the product and not the character of the company
20 that makes it.

21 THE COURT: Okay. So if it is defamation, *per se*, then
22 where are we?

23 They would -- On the defamation claim, they would be
24 entitled to nominal damages.

25 MR. MASSO: Yes.

1 THE COURT: That's it because there are no damages that
2 are demonstrated except for arguably reputational damages.

3 MR. MASSO: Well, we don't believe they put on any
4 evidence of any damages at all, whether special damages or
5 reputational damages. They didn't offer an expert. They haven't
6 put anything ---

7 THE COURT: Well, they have an expert. They have Mimms
8 as their expert.

9 MR. MASSO: But they didn't offer that in response to
10 the Motion for Summary Judgment. Their only response to the MSJ
11 was about causation on Page 46 where they offer the ---

12 THE COURT: I think it was quite clear that
13 Mr. Muckenfuss did not anticipate that the Judge would be
14 spending an hour and a half on a subject that takes two pages in
15 length in the Plaintiff's brief. Your point is taken.

16 I don't remember what you're saying, though. That
17 Mimms is not -- There's no reference to Mimms in the briefing?

18 MR. MASSO: They don't -- In response to our Motion for
19 Summary Judgment, they do not rely on Mimms. So they do not at
20 any point say, "Here's our evidence of causation and here's our
21 damages." They just say there was causation because one thing
22 happened after another or somebody told somebody who told
23 Chris Boyd about Carrier. Not Chris Boyd; I'm sorry. That's a
24 radio personality. Tim Boyd; told Tim Boyd about Carrier which
25 is -- we've got a double hearsay issue, I know. I'm not going to

1 beat that dead horse, but they don't mention Mimms. Mimms does
2 not get a single word.

3 THE COURT: You want to talk about the state of mind
4 hearsay exception?

5 MR. MASSO: I'm sorry?

6 THE COURT: State of mind.

7 MR. MASSO: Ahh. I agree with Your Honor that seems
8 like a stretch. It seems like the exception would consume the
9 rule if we said a state of mind if all you're saying is, "Well,
10 here is my state of mind," and you're not offering it for the
11 truth of the matter. How is that not the truth of the matter
12 asserted?

13 But I don't think we even need to get there because in
14 this case it's double hearsay. We do not have a situation where
15 Tim Boyd is testifying, "Chris Opie told me his state of mind."
16 That's not the testimony. Tim Boyd's testimony is that
17 Chris Opie at Carrier told someone at GPS who told him what
18 Carrier was doing and why. So even if 8033 would give them an
19 exception to the hearsay rule for that first statement, it
20 doesn't take care of the second statement. We still have a
21 double hearsay problem and it's still excludable.

22 THE COURT: Okay. All right. Unless you have
23 something else you want to say on that subject, I'll go to
24 counsel for enVerid.

25 All right. Mr. Reed, you can address this question of

1 conspiracy as a basis for liability, also.

2 MR. REED: I'm sorry. As I was walking up here,

3 Your Honor, you said address the conspiracy?

4 THE COURT: Yes.

5 MR. REED: Thank you, Your Honor.

6 THE COURT: As well as anything else you want to say
7 about causation.

8 MR. REED: And I'll -- And I'll do my best not to
9 repeat what Mr. Masso went on about causation so that -- because
10 we're aligned on that issue that there hasn't been damages
11 presented as far as in response to this Motion for Summary
12 Judgment. As far as the conspiracy, ---

13 THE COURT: Well, I would prefer that we phrase this as
14 a problem with causation. In Mimms, Mimms talks about damages.
15 The problem is causation, not damages. The problem, as I see it,
16 is a lack of linkage between the actions that are challenged here
17 and an injury of any type because of the nature of the evidence
18 that is offered. Had we had testimony from Carrier, Boyd, all
19 the others I've listed, school district, Newark, we'd have
20 causation. And Mimms, I think, could assume causation and
21 testify about damages resulting from causation.

22 So to me, your problem is not -- I mean maybe these are
23 just two ways of describing the same phenomenon, but I -- I
24 believe the problem is causation.

25 MR. REED: Yes, Your Honor. So do you want to move on

1 to conspiracy then?

2 THE COURT: Unless you have something to say about
3 causation.

4 MR. REED: I -- I don't, Your Honor, --

5 THE COURT: Okay.

6 MR. REED: -- other than the fact of when we are
7 talking about the Carrier MOU, I do think that maybe it's missed
8 there that this was a Memorandum of Understanding that was
9 completely aspirational, that had no obligations whatsoever by
10 Carrier to do anything. So even if for some reason you could
11 look at that contract, it doesn't support a causal effect there.

12 THE COURT: Okay. So let's -- let's talk about this --
13 I can't remember what the phrase was -- "bipolar backlash." What
14 about that?

15 MR. REED: Yes, Your Honor. And what we -- you know,
16 and what I've seen in the motion, what I've heard counsel talk
17 about here today is I think he said "a mountain of e-mails." And
18 when you read the motion, what -- he and his corporate rep in
19 this, they don't have any direct evidence. Mr. Boyle testified
20 they have no direct evidence of -- of a conspiracy or of enVerid
21 telling Marwa Zaatari to do anything as far as the statements or
22 the Open Letter or any of that concern.

23 So what they try to do here and -- and what I
24 envisioned when I read that paragraph is a conspiracy theorist,
25 and we've got pins and red strings all over the wall here. And

1 what they try to do is take the Court through an October, 2020,
2 e-mail between individuals at enVerid that does not include
3 Marwa Zaatari. And then they try to then draw a string over to
4 an April 9, 2021, e-mail between Zaatari and someone at Duke
5 about an Open Letter.

6 And then they add onto that the Weeks e-mail, which is
7 the bipolar backlash e-mail that you were referring to, that does
8 not include that conversation, does not include -- the original
9 one doesn't include Marwa Zaatari and, in fact, is talking about
10 another scientist, Ms. Farmer or Dr. Farmer, who's also an
11 ioniser critic. That -- That e-mail's then forwarded on to
12 Zaatari with just an FYI to come up with this whole idea that
13 there's this mountain of -- of a conspiracy.

14 But the problem with that is -- and the Court is aware
15 and I think we've cited it in our -- in our papers here, the *Wynn*
16 *versus Hong* case, in that to prove a vital fact, you can use
17 inferences but you can't prove it by unreasonable inferences or
18 piling inferences upon inferences. And that's exactly what the
19 Court is asked or what the GPS is asking the Court to do is to
20 pile an inference about: Okay, when Mr. Weeks is having a
21 strategy call with someone else at enVerid and then because there
22 is another e-mail months later between Mrs. Zaatari and someone
23 at Duke about her Open Letter, that somehow that there's an
24 inference that in that letter he's telling her to do something
25 even though she's not copied. What they don't provide you,

1 though, is any e-mails to her where she's told, "Hey, go out and
2 make these tweets." Yeah, they -- they say, "Hey, we'd like you
3 to like some of our tweets," and that's some of their evidence
4 for an inference. That doesn't amount to what the Court was
5 asking them here as: Where is the evidence that, one, that we
6 had a meeting of the minds here from someone at enVerid with
7 control to -- with Ms. Zaatari to go out and perform an unlawful
8 act, to go out and perform -- to say, if you're assuming that
9 these statements -- And I don't concede that they're false when
10 we get into the 29 of them, but there's no meeting of the minds
11 demonstrated in that string of web there to meet the conspiracy
12 elements, Your Honor.

13 THE COURT: Okay. All right. Thanks.

14 MR. REED: All right. Thank you.

15 THE COURT: All right. One of the Mr. Shields, come on
16 up here and talk about this Motion to Join Third-Party
17 Defendants. Sorry, not "Defendants," responsible third parties.

18 While you're walking up here, I'm not happy about this
19 motion, so give it your best shot because I cannot imagine that
20 state law was intended to allow this. First of all, these people
21 -- This is a whole side show of potential litigation. Mr. Walker
22 and companies Falfurrias Capital Partners and Nu-Calgon, (this is
23 Document 336), I think whatever duties they have are duties to
24 GPS, not to you. If I let you join -- not "join," but I let you
25 designate these people as responsible third-parties in a jury

1 charge, we are off on a side show like no other.

2 I get it that you have done this within the time
3 allowed by Texas law, but to permit that in this case would
4 eviscerate my Scheduling Order. So other than that, I'm not a
5 really big fan.

6 So I'll hear from you. Give it your best shot because
7 I'm not enamored at this one at all.

8 MR. DAVID SHIELDS: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. DAVID SHIELDS: May it please the Court.

11 David Shields on behalf of Dr. Zaatar and enVerid.

12 THE COURT: I just don't want Mr. Muckenfuss to feel so
13 bad.

14 MR. DAVID SHIELDS: I am sure after that he does not,
15 Your Honor.

16 So steering a long uphill climb in the face, at first
17 it's clear that the -- that federal courts do occasionally adopt
18 state law.

19 THE COURT: I've done -- I have done what you are
20 asking, setting aside the particulars, many times. It's usually
21 the rare motor vehicle accident that ends up in federal court for
22 peculiar reasons. Sometimes someone is deceased and -- or
23 they've settled, and that is what happens. I have never in 22,
24 almost 23 years on the bench ever had a request to do it like
25 this. There's a first time for everything.

1 MR. DAVID SHIELDS: There is a first time for
2 everything, Your Honor.

3 So Chapter 33, the *Texas Civil Practice and Remedies*
4 *Code*, Section 4, allows a defendant to name other responsible
5 parties that caused -- that caused or contributed to the harm to
6 the plaintiff. And there's two concepts that -- You know, again,
7 I understand there's some headwinds to this discussion,
8 Your Honor, but there's two concepts in the statute that are
9 directly applicable here which is: The duty is not to the
10 defendants.

11 THE COURT: Right.

12 MR. DAVID SHIELDS: A responsible third-party doesn't
13 ever have to meet the defendant, just like in a car accident.
14 And it is not a doubt contributing to the duty or the breach or
15 the Lanham Act violation of the defendants. It's about breach --
16 It's of contributing to a harm in breach of a duty between the
17 responsible third-party and the plaintiff. So actually the
18 defendant doesn't have anything to do with that whole discussion.

19 The Plaintiff is seeking to recover from Defendants
20 certain harm. Here, reputational harm and lost profits.

21 We have submitted Nu-Calgon, Kenneth Walker, and
22 Falfurrias Capital for contributing to the harm, lost profits in
23 breach of a duty to the Plaintiff. And that's the basis of *Texas*
24 *Civil Practice and Remedies Code 33.004*, and we've outlined that
25 and attached case law where the -- Mr. Walker and Falfurrias

1 Capital, as board members and chairman of the board, owe duties,
2 certain duties to the Plaintiff and that Plaintiff is -- or those
3 duties -- excuse me -- are pretty clear under North Carolina law,
4 and those duties were breached.

5 And it's important to release "allegedly breached."
6 Certainly, that's not going to be on trial. They're not going to
7 show up. They're not going to provide testimony, but we believe
8 we are entitled, just based on -- and this is a key point -- just
9 based on the representations of Mr. Walker in both public
10 representations on the website and in the document cited in the
11 Appendix, that those actions, based on his actions to Plaintiff,
12 caused or contributed to the harm sought which are lost profits.

13 THE COURT: So is it your position that I have no
14 discretion in this regard? I am required, as a matter of law, to
15 allow you to do it at this stage of the litigation?

16 MR. DAVID SHIELDS: Our position is that -- that the
17 rights in the ---

18 THE COURT: Simple question.

19 MR. DAVID SHIELDS: Yes, Your Honor. The rights in the
20 statute provide that we can -- that Defendants can designate a
21 responsible third-party at any time prior to 60 days before
22 trial.

23 THE COURT: "Yes." So the answer is "yes."

24 MR. DAVID SHIELDS: After that, we acknowledge it is up
25 to the Court's discretion.

1 THE COURT: So the answer is "yes."

2 MR. DAVID SHIELDS: Yes.

3 THE COURT: You did it on the day, and I am required
4 and have no discretion whatsoever. And if I limit the time,
5 which -- if we have a trial -- I will, you're going to spend some
6 of yours on this side show of whether these parties should bear a
7 piece of the liability. Otherwise, argue those to your client.

8 MR. DAVID SHIELDS: Your Honor, there are many
9 producing causes that could drop the -- or lower the profits of
10 the Plaintiff. A lot of those are the subject of the Motion to
11 Strike Mr. Mimms. There are many producing causes. We are
12 asking for individuals that caused or contributed to that harm
13 that are contained in the documents and that have made their own
14 statements on their participation in Plaintiff's actions to be on
15 that -- to be included and before the -- before the jury if and
16 when they make a decision.

24 MR. DAVID SHIELDS: If the motion is granted and
25 Falfurrias Capital, Mr. Walker and Nu-Calgon are permitted on the

1 jury charge, yes, Your Honor, we will spend some of that limited
2 time.

3 THE COURT: And this motion is being asserted for your
4 clients only, Zaatari and D Zine, not for enVerid.

5 MR. DAVID SHIELDS: I do not believe that enVerid has
6 joined this motion.

7 THE COURT: Okay. Thank you.

8 All right. EnVerid want to be heard on this motion?

9 Mr. Reed?

10 MR. REED: No, Your Honor. We have not joined this
11 motion.

12 THE COURT: Okay. Well, are you in favor of the motion
13 or opposed to the motion?

14 MR. REED: My client has not taken a position on the
15 motion, Your Honor.

16 THE COURT: Yeah. I asked you a question. Are you
17 opposing the motion? Are you telling me you are instructed by
18 your client to remain silent and not say whether you're in favor
19 of it or not?

20 MR TOBIN: Your Honor, may I comment?

21 THE COURT: Yes. Go ahead and talk for a minute. I'm
22 going to talk to my court reporter, so don't speak on the record.

23 (Pause)

24 THE COURT: All right. Go ahead, Mr. Tobin.

25 | MR TOBIN: Thank you, Your Honor.

1 We did not take a position on the motion on the merits.
2 To answer Your Honor's question, though, given Your Honor's
3 comments that there will be time limited, if there is a trial, to
4 the extent that the Court is envisioning that all the Defendants
5 share the same amount of time, then, yes, we would oppose the
6 motion because that's going to take into some of our valuable
7 time on the way we would present the case and our strategy.

8 THE COURT: Okay. All right. Thank you.

9 All right. Mr. Muckenfuss, you can respond to anything
10 that's been said so far.

11 MS. ANGELICH: Good morning, Your Honor.
12 Brittany Angelich on behalf of the Plaintiff.

13 THE COURT: Sorry. "Brittany Angelich"?

14 MS. ANGELICH: Angelich. Yes, Your Honor.

15 THE COURT: Okay, great. Thank you.

16 MS. ANGELICH: As the Court acknowledged, this is not a
17 simple negligence case. This is a case for defamation under the
18 Lanham Act, et cetera. In our response, we cite a case where
19 courts have specifically declined to apply the *Texas Civil*
20 *Practice and Remedies Code*, Section 33.004, to federal claims
21 such as the Lanham Act, and courts have also declined to
22 designate responsible third-parties in defamation claims such as
23 this. We would acknowledge that the Court does have discretion
24 at this stage, given that we timely objected to the Motion for
25 Leave to File a Responsible Third-Party, and we would ask that

1 the Court decline the motion based on the fact that there's no
2 evidence or the Defendants have failed to plead at this stage
3 that Nu-Calgon, Mr. Walker or Falfurrias would have any
4 responsibility for the claims that GPS is bringing.

5 THE COURT: Okay. Thank you.

6 All right. I don't know who would be addressing the
7 issue of the Motion for Continuance. Is -- Is the Defense still
8 urging the continuance?

9 MR. DAVID SHIELDS: Yes, Your Honor. And that would be
10 the elder Mr. Shields that just stepped out for just a moment.

11 THE COURT: Okay. And is the -- Because you all were
12 beating the drum pretty hard about the case going to trial on the
13 dates set and now you're not.

14 MR. DAVID SHIELDS: May I begin and then if ---

15 THE COURT: Yes. You don't have to begin. I'm just
16 saying why I'm raising the question now. I just wanted to know
17 if -- You may be able to answer this question. If not, we'll
18 wait for Mr. Shields to return.

19 MR. DAVID SHIELDS: Let me attempt to keep it going,
20 Your Honor.

21 THE COURT: The dispute -- The dispute regarding
22 Mr. Garris, --

23 MR. DAVID SHIELDS: Yes.

24 THE COURT: -- G-A-R-R-I-S, is a pretty serious side
25 show issue regarding whether Mr. Garris was properly contacted,

1 what Mr. Garris said, whether Mr. Garris lied to Defense counsel
2 to get Defense counsel to leave him alone, et cetera, et cetera.

3 Is it correct that it is -- This is the only question
4 I'm going to ask you and then I'll wait. Is it -- Okay. There
5 you go. Right on time.

6 (Mr. James Shields returned to the courtroom.)

7 MR. JAMES SHIELDS: Your Honor, I was down the hall. I
8 apologize.

9 THE COURT: No, no. You told me you were. I didn't
10 know this was your matter or I wouldn't have raised it while you
11 were gone.

12 MR. JAMES SHIELDS: Because of volume, we had to split
13 it up.

14 THE COURT: Okay. So is the main basis for the Motion
15 for Continuance filed by the Defendants the Garris issue? That's
16 all I want to know.

17 MR. JAMES SHIELDS: I missed the last two words you
18 said.

19 THE COURT: The Garris issue.

20 MR. JAMES SHIELDS: Your Honor, there's a couple of
21 reasons. That's primarily it.

22 THE COURT: Okay. So the last -- The briefing on this
23 is that the basis for the Motion for Continuance is that
24 Mr. Garris, a former employee of GPS, spilled his guts, gave you
25 all kinds of dramatically important bad information about the

1 Plaintiff. Then his lawyer from Indiana contacted GPS' counsel
2 and said that Defense counsel was hounding him, and he said what
3 he thought you wanted to hear to get you off his back and now
4 it's all false. Did I summarize everybody's respective position?

5 MR. JAMES SHIELDS: Yes, ma'am.

6 THE COURT: Okay.

7 MR. JAMES SHIELDS: As an advocate, I would like to go
8 further than that but I won't.

9 THE COURT: Okay.

10 MR. JAMES SHIELDS: Yeah.

11 THE COURT: So given the state of the record, this is
12 the only issue I have on the Motion for Continuance because we're
13 not going to get to everything that's been filed. It's not
14 possible.

15 Given the dispute about Mr. Garris and what is true and
16 what is false, why would I grant a continuance based on that
17 issue?

18 MR. JAMES SHIELDS: Your Honor, it's not the Garris
19 issue -- I've been vaccinated and boosted, so I'm going to take
20 that off.

21 It's not the -- It's not Keith Garris and five hours'
22 worth of tapes. He exposed the fact that GPS has actively -- We
23 have demonstrable proof that they have not complied with
24 discovery orders of this Court, primarily a June 15th Order which
25 required production of all data, summaries, tests, drafts,

1 et cetera. We have unassailable new evidence, proof, that they
2 haven't complied with the Court's Order.

3 So to suggest that it's just Keith Garris, would I like
4 to depose Mr. Garris and get, you know, a wealth of information
5 from him? Of course.

6 The point of the Garris communications, Your Honor, is
7 the failure of GPS to produce evidence. The entire exchange on
8 causation which -- and the question that the Court -- Maybe it's
9 part of the elephant in the room that's the flip side of the coin
10 for causation is: We believe Dr. Zaatari was right to the extent
11 any of her statements go to the science. We also know, for
12 example, LMS as a lab, we have directly -- We designated him.
13 We've directly identified tests that they have not produced in
14 evidence.

15 We have a June 15th Order from Magistrate Ramirez who
16 said, "Produce all data, summaries, test results, information,
17 communications," and we know as a matter of certainty now that
18 that has not been done. Our continuance is not predicated only
19 on Keith Garris' statements but on the highlight of the
20 noncompliance in production.

21 THE COURT: Okay. So you're not claiming that the
22 materials were produced late. You're claiming they weren't
23 produced at all.

24 MR. JAMES SHIELDS: It's both.

25 THE COURT: Okay. All right.

1 MR. JAMES SHIELDS: There are -- Sixty-two percent of
2 all the production, Your Honor, came ---

3 THE COURT: Yeah, I know.

4 MR. JAMES SHIELDS: Yeah, yeah, yeah.

5 THE COURT: What is the -- What is the field, the
6 general description of the materials that you claim, based, I
7 guess, on your conversations with Mr. Garris, that were never
8 produced and that you know these documents exist because of what?

9 MR. JAMES SHIELDS: There are multiple labs that we
10 know about. We believe that there may be other labs for testing
11 that we don't know about because we don't know what we don't know
12 that haven't been produced, number one.

13 Number two, we know that there are at least two
14 different labs, Boeing and LMS, that conducted tests, had
15 materials, have summaries, have results that have not been
16 produced. We know ---

17 THE COURT: Well, Boeing is all over this case.

18 MR. JAMES SHIELDS: It is.

19 THE COURT: If you thought Boeing had additional
20 documents, why didn't you go ask for them?

21 MR. JAMES SHIELDS: Because the Court Order from June
22 15th says they have to produce it. We -- We don't have the
23 burden of proof, Judge.

24 THE COURT: Okay. I -- I get that, Mr. Shields. The
25 problem is that, you know, this dumb-founded reaction to finding

1 out that Boeing might have some documents I find odd under the
2 circumstances. I know who has the burden of proof of here, and I
3 know what's going to happen to parties who are ordered to produce
4 documents and haven't produced them. What I'm trying to figure
5 out is whether it justifies a continuance.

6 So what I want from you is, as specific as you can give
7 to me, what you know exists that you didn't get and how you know
8 it exists. So we've got Boeing documents. We've got what else?

9 MR. JAMES SHIELDS: Your Honor, we've had
10 conversations. He's been designated with a gentleman called
11 Al Vatine who is a principal with a lab who directly said that
12 they conducted more tests for GPS that were not produced. He
13 scoured the GPS production record and he said, "Oh, no. You
14 don't have the tests, all the tests that we produced."

15 THE COURT: This is not Albert Brockman? It's another
16 person?

17 MR. JAMES SHIELDS: No. It's somebody else. Yes,
18 ma'am.

19 THE COURT: Okay. All right.

20 MR. JAMES SHIELDS: Yes, ma'am.

21 THE COURT: Okay.

22 MR. JAMES SHIELDS: And so that's -- We don't know what
23 we don't know. We only know of a couple of instances in which
24 tests were conducted that we believe are completely exculpatory
25 for our client that have not been produced. The continuance is

1 predicated on simply: Let us have the documents timely. It's
2 also predicated on the massive redactions without any kind of a
3 log or explanation, and those documents came in after the
4 deadline, so we didn't have the chance to take depositions on
5 them. It's really those two buckets.

6 The redactions with no log, Judge, no claim of
7 privilege or confidentiality or anything else, they just
8 redacted. And then we now know as a matter of fact that there
9 are test results that have not been produced in compliance with
10 the June 15th Order. That's as specific -- And I think Fact No.
11 3 is that, and the Court knows this, 62 percent of the docs that
12 came in came in after the deadline. We couldn't ask questions on
13 them because they produced them late.

14 THE COURT: You did take a few depositions after the
15 deadline, didn't you?

16 MR. JAMES SHIELDS: Yes, ma'am, we did.

17 THE COURT: Okay.

18 MR. JAMES SHIELDS: We took them on.

19 THE COURT: Okay.

20 MR. JAMES SHIELDS: But -- But as an illustration,
21 Judge, two of the three data productions, data dumps, came within
22 a day or two before we had a hearing with Judge Ramirez, after
23 the depositions were taken. So that's 62 percent. The bulk came
24 in after the depositions were already taken, and they took them
25 right before we had Motions to Compel hearing in front of

1 Magistrate Ramirez.

2 THE COURT: Okay.

3 MR. JAMES SHIELDS: We didn't have the docs to take the
4 deps, and we didn't have the unredacted docs to take the deps.

5 THE COURT: Very aliterate.

6 MR. JAMES SHIELDS: I apologize, Your Honor.

7 The last comment that I would like ---

8 THE COURT: Aliterate. I wasn't insulting you.

9 MR. JAMES SHIELDS: Oh, okay.

10 THE COURT: The docs before the deps.

11 MR. JAMES SHIELDS: You know, Judge, I probably ---

12 THE COURT: I would not on my worst day ever say to a
13 lawyer, "You're very illiterate."

14 MR. JAMES SHIELDS: Well, I'm going to take that as
15 compliment, not as a, you know, as a -- Judge, I characterize
16 myself -- I've been trying cases for a long time -- as just a
17 poor country trial lawyer. That's all I do.

18 THE COURT: Yeah, I've seen a bunch of them.

19 MR. JAMES SHIELDS: Yes.

20 THE COURT: All right.

21 MR. JAMES SHIELDS: May I make one other comment to the
22 Court?

23 THE COURT: Yes.

24 MR. JAMES SHIELDS: The other thing that was
25 highlighted by the Keith Garris tapes is the destruction of

1 evidence. There are multiple references in those tapes,
2 Your Honor, about how GPS directed him, the CEO, to remove
3 evidence, destroy text messages.

4 THE COURT: Okay. Are you vouching for this guy?

5 MR. JAMES SHIELDS: No, ma'am.

6 THE COURT: Okay.

7 MR. JAMES SHIELDS: I'm not. Absolutely not. What I
8 am saying is that we should be entitled to investigate -- We
9 didn't know that there was evidence destroyed. We should have
10 the opportunity to examine that because if that ---

11 THE COURT: Okay. So if you're trying to turn down the
12 temperature, as I suggested at the beginning, I would say, "We
13 had no reason to think documents were destroyed and we still
14 don't know if they were destroyed, but I'd like to look into it,
15 Your Honor," as opposed to accusing McGuireWoods of destroying
16 documents.

17 MR. JAMES SHIELDS: You're -- You're exactly right.

18 THE COURT: Okay.

19 MR. JAMES SHIELDS: By the way, thank you. Your Honor,
20 you're exactly right. I don't want to be the cause of escalating
21 tensions between counsel.

22 THE COURT: Well, it may be too late for that.

23 MR. JAMES SHIELDS: It may be.

24 THE COURT: This thing is another galaxy of mutual
25 disdain that makes me very unhappy and gives me indigestion.

1 MR. JAMES SHIELDS: That I do accept as legitimate
2 criticism, and I'm -- and I'm just -- Judge, you're right.

3 THE COURT: Okay.

4 MR. JAMES SHIELDS: It's not how I practice. It's not
5 my reputation. You're absolutely right.

6 THE COURT: Well, it all floats up. Somebody says
7 something to somebody else, and then there's a response. And the
8 condition of the world today is that civility is a little valued
9 concept except by me. So -- All right. Enough said. I'm not
10 picking on you by yourself.

11 This is a comment that is directed to every one of you.

12 Okay. All right. Thank you very much, Mr. Shields.

13 MR. JAMES SHIELDS: Okay. Thank you, Judge.

14 THE COURT: All right. Mr. Muckenfuss, I think it's
15 back at you.

16 Ms. Wheatley?

17 MS. WHEATLEY: Yes, Your Honor.

18 THE COURT: Okay.

19 MS. WHEATLEY: I'm up. One thing I did want to raise
20 quickly because I do think it's important to have on the record:
21 With respect to summary judgment, we didn't discuss the causation
22 standard with respect to the Lanham Act claims. I just want to
23 make it clear that is a different standard that hasn't been
24 addressed in this hearing. If you'd like to hear it, we're happy
25 to address it.

1 THE COURT: Sure.

2 MS. WHEATLEY: Do you want me to address it now?

3 THE COURT: Sure.

4 MS. WHEATLEY: Okay. With respect to a Lanham Act
5 claim, there is no requirement that the plaintiff show a link
6 between a specific lost sale and the statement. So plaintiff has
7 to show materiality, and they have to show that it is likely to
8 cause harm or likely to mislead the buyers. So the -- the entire
9 discussion of whether or not we can show that a particular
10 customer -- there's testimony of a particular customer saying, "I
11 did not do business with GPS because of this exact statement,"
12 does not apply to the Lanham Act claims. So I think that's very
13 important.

14 THE COURT: Okay. So I -- I accept that it's a
15 different causation standard. But assuming that I hold that the
16 evidence that is either in the testimony of Mr. Boyd and
17 Mr. Brinckman or in their declarations is not admissible, what is
18 the causation link that would satisfy the Lanham Act? These are
19 material statements, and how will you prove that?

20 MS. WHEATLEY: With respect to materiality, a statement
21 is material if it goes to the inherent function of the product.
22 Claiming that the products are unsafe, that they make the air
23 quality in schools worse, that they release ozone, that they
24 release VOCs, that they do not work, that the manufacturer is
25 using sheeting techniques, that they do not reduce airborne COVID

1 contrary to what the manufacturer has said, those are all going
2 to the inherent qualities of the product. That is, in fact, why
3 you buy the product. And these are very specific statements
4 mentioning GPS and saying that -- saying all these things. I
5 mean these are -- This is, per se, material. This is not a
6 question of, you know, saying is it, you know, the best pizza or
7 something. This is saying the product does not work and tests
8 show the product does not work. And this is from the perspective
9 of someone who is presenting themselves as a self-described expert
10 who has access to scientific data and is saying that data shows
11 specific things about these products. So we would say that
12 easily satisfies the materiality standard.

13 And with the other ---

14 THE COURT: Let me interrupt you --

15 MS. WHEATLEY: Sorry.

16 THE COURT: -- and come back to where you are.

17 If I accept that premise, then what would be the basis
18 for a damage loss? Mr. Mimms would assume materiality and then
19 what? What would the required burden be for linking actual
20 damages to the Lanham Act violation?

21 MS. WHEATLEY: So with respect to Lanham Act false
22 advertising and product disparagement claims, the fact of
23 materiality and that it is likely to mislead consumers is
24 separate from the amount of damages. While you do have to prove
25 materiality, you do not have to precisely link that to the

1 amount. You can use a decline in sales, an explanation of how
2 that follows in time to show the amount.

3 And one piece that is very important here, you asked
4 how did we know that these specific customers named knew about
5 the statements in question, and you raised the issue that
6 Mr. Boyd's declaration, Mr. Brinckman's testimony, Mr. Boyle's
7 testimony is hearsay. However, the fact that customers mentioned
8 the statement to them in the calls where they canceled the
9 contracts shows that they knew about the statements, and the fact
10 of their knowledge is not hearsay. We're not offering that for
11 the truth of anything they have said. We are offering it to
12 prove that they knew of the statement and then immediately
13 thereafter, upon mentioning the statements, canceled the
14 contract.

15 And we may not be able to offer it to show the
16 "because" part. That is certainly acceptable circumstantial
17 evidence in a false advertising and we would also say a business
18 disparagement and defamation case that could go to the jury, that
19 customers knew. We know that they knew because they said,
20 referenced the statements. And so that is a very important
21 point, and that is not hearsay.

22 And I would also raise that, again, going to this
23 evidence of this link, the Fifth Circuit in *Morris Jewelers v.*
24 *General Electric Corp.* ---

25 THE COURT: That's my case from when I was a baby

1 lawyer. Is that actually in the books? That's an old case, so
2 I'm just going to say that.

3 MS. WHEATLEY: It is, Your Honor, and we think it was
4 well decided. And it held that statements by plaintiff's
5 customers were admissible to show the state of mind as to why
6 they canceled. And so even if we don't have that "because," we
7 have: They called our client. They said, "Here are the
8 statements we've heard about. We can't continue to do business
9 with you." And that, we would say, is evidence that can go to
10 the jury, and none of that is hearsay. We're not using it for
11 the truth of the matter asserted. We're using it for the fact
12 that they knew and then immediately canceled the contract which
13 knowledge is different, and then the cancellation is a verbal
14 act. It's not hearsay. It is -- It is a fact our client can
15 testify to.

16 THE COURT: Well, they're not contesting that the
17 cancellations are admissible. The cancellations are admissible.

18 MS. WHEATLEY: So, Your Honor, that would -- that would
19 go to this causative link, but I do want to reiterate that with
20 the Lanham Act, that precise causation as to damages ---

21 THE COURT: All right. I hear you.

22 MS. WHEATLEY: Yeah. And I won't belabor the point.

23 THE COURT: Okay. All right.

24 MS. WHEATLEY: But I -- If -- If -- If you don't have
25 any questions on that, I can address the continuance.

1 THE COURT: Okay.

2 MS. WHEATLEY: I -- I have to put on the record that we
3 very strenuously dispute any suggestion that anyone at GPS ever
4 deleted any evidence. And there's the -- The only sworn
5 statement on the record about that is from Mr. Garris who says
6 that is absolutely untrue. And I am happy to go into more detail
7 as to the circumstances of that. I think in the tapes, you'll
8 see there's a hint where Mr. Garris at one point asked about this
9 again; starts talking about how there were personal things on his
10 computer. We didn't really want to embarrass Mr. Garris as to
11 why he was terminated, but that would come out if we continue
12 down this road.

13 But in the interest of lowering the temperature, I do
14 not think we need to because there is nothing whatsoever in the
15 tapes, in the affidavit from Ms. Fontein that was not previously
16 disclosed in discovery.

17 Information on Boeing was known to everyone before this
18 case began. The Boeing testing was something Dr. Zaatarie tweeted
19 about a great deal. Boeing was raised in the Complaint.
20 Defendants were well aware of Boeing. And I think it's very
21 telling when you listen to those tapes, over and over and over
22 again Dr. Zaatarie, her husband say, "Just give us one text, one
23 message, one thing Charlie told you to do, something that will
24 allow me to reopen discovery," and they begged Mr. Garris to give
25 them something that they don't have, something concrete. I think

1 they actually used those words, "something concrete."

2 Mr. Garris cannot come up with anything. And e-mails
3 from Mr. Garris were in this production in the very beginning,
4 produced in the very beginning of the case. E-mails with
5 Mr. Garris and Boeing were produced at the very beginning of the
6 case. This has all been known. And even in the calls,
7 Mr. Garris admits that this story about a secret Boeing hard
8 drive, he made it all up. He says that to Mr. Zaatari in the
9 calls themselves, and then his sworn declaration verifies that.

10 THE COURT: Okay. But at this juncture, I'm
11 considering him inaccurate in every respect. I have no basis for
12 concluding otherwise. He tells Story A. He disavows Story A.
13 He tells Story B. I have no idea what the truth is with respect
14 to Mr. Garris, and I don't know -- I can't make a decision based
15 on that.

16 And I'll add one footnote, and I'm certainly not going
17 to contribute to an escalation in the heat here, but in the six
18 months before I was confirmed as a judge, I had a hearing before
19 Judge Sparks, and my client was telling me on a stack of 12
20 Bibles that Document A did not exist. And I stood before
21 Judge Sparks and said, "Document A does not exist and I'm
22 offended that they suggest it does." And Judge Sparks had all of
23 his antenna going full bore and he said to me, while I was
24 writing an e-mail to my associate, "Someone's going to jail today
25 and if it's me, I'll never be a federal judge," and he made my

1 client file an affidavit under penalty of perjury that there was
2 no Document A and -- Eureka! -- Document A appeared to my great
3 disappointment. Fast-forward in the six months after I became a
4 judge, something very similar happened and I did the same, and
5 Document A appeared yet again.

6 So I'm not suggesting anyone is hiding anything, but
7 there is a difference between a client making a representation
8 under oath and counsel representing to me what the truth about
9 what clients have and don't because you really don't know. All
10 you can tell me is what your clients are telling you. That's all
11 you're expected to tell me. You're not a guarantor. So I'm not
12 suggesting anybody is hiding any documents, but don't put
13 yourself too far ahead on that limb because you don't have to.
14 It's clients who discover documents unless lawyers are hiding
15 them, and I've never had that happen, and I don't expect it's
16 happening here.

17 So if there has to be sorting out about whether
18 documents exist or don't, somebody from the client will tell me
19 under oath that they do or they don't. You don't have to. So
20 again, with the complete caveat I'm not accusing GPS or the
21 Defendants of hiding anything from me, but if that becomes an
22 issue, we're going to sort it out differently from lawyers
23 telling me what they think the facts are because you only know
24 what you know.

25 MS. WHEATLEY: Thank you, Your Honor. I agree with all

1 of the above.

2 THE COURT: Okay.

3 MS. WHEATLEY: One thing I can represent, based on my
4 knowledge, is that at least one test report from LMS -- I think
5 it encompasses multiple tests -- was produced in this case and
6 e-mails from LMS have also been produced in this case.

7 I can also say that at one point Mr. Vatine had a
8 signed engagement letter with me personally as a privileged
9 litigation consultant. So you can see why there may be some
10 confusion here.

11 THE COURT: Yes.

12 MS. WHEATLEY: But LMS has been known to everyone. LMS
13 conducted the Trane testing which is the other big set of public
14 testing that Dr. Zaatari discussed.

15 So, again, for the purposes of a continuance, there's
16 -- it is nonsense to suggest that LMS was unknown to Defendants.
17 And as you mentioned, the vast majority of depositions in this
18 case were actually conducted after the close of the discovery
19 deadline. To my knowledge -- I should be careful here -- I don't
20 believe that -- When Defendants said they wanted to depose
21 someone at GPS, they were permitted to depose them.

22 THE COURT: Okay. I want to ask you a practical
23 question. So here we are November 8th. The case is set in less
24 than three weeks. There's a holiday in there. Because of the
25 timing of when these motions were filed and the nature of them,

1 the practicality of me being able to get these all decided in
2 time for you to go to trial and know what you're trying and who
3 can testify is pretty remote.

4 Let's assume there wasn't a Motion for Continuance.

5 You're three weeks away from the trial. You don't know what the
6 heck I'm going to let you do and by whom. You still want to go
7 to trial on November 28th with that level of uncertainty?

8 MS. WHEATLEY: Yes, Your Honor, and I'd like to explain
9 why.

10 Dr. Zaatari tweets almost daily things about our
11 client. She has now escalated to accusing our client of being
12 xenophobic and making specific racist statements to her which is
13 a totally new accusation.

14 THE COURT: Well, they say they've produced documents
15 about that very early on in the litigation.

16 MS. WHEATLEY: I -- I cannot imagine ---

17 THE COURT: Who is speaking for the Defense on this
18 subject? Somebody in the back?

19 MR. DAVID SHIELDS: Your Honor, I'll take
20 responsibility for that.

21 THE COURT: Okay. Am I recalling this incorrectly?
22 Aren't you saying you produced documents early on where this
23 question of Ms. Zaatari being the subject of xenophobic racist
24 remarks was in an early production?

25 MR. DAVID SHIELDS: Two things, Your Honor.

1 One, it was in the declaration in support of the
2 summary judgment or I guess in response to their summary judgment
3 on the intentional infliction of emotional distress. And
4 Dr. Zaatarai has gone at length to go back through documents,
5 actually not produced by us but produced by GPS, to support those
6 allegations. And I'm not sure if this made it into a pleading,
7 whether McGuireWoods filed it or whether we included it, but we
8 offered to have McGuireWoods and GPS take Dr. Zaatarai's
9 deposition on this specific allegation, and they declined to do
10 so. That was back in September.

11 THE COURT: Okay. All right. Go ahead, counsel.

12 MS. WHEATLEY: Your Honor, I would like to first
13 address the comment on the offer to take Zaatarai -- Dr. Zaatarai's
14 deposition again. The offer was contingent on we waived various
15 claims that certain things were untimely. And we said, "Well,
16 we're not going to waive our claims in order to take the
17 deposition." And we asked, "Is the offer to take the deposition
18 still on the table if we will not waive certain claims and
19 defenses?" And it was not, so we did not take them up on that
20 offer.

21 With the representation that there is a document about
22 racist statements early in the production, I did not hear
23 identification of one there. And I would note that the
24 declaration from Dr. Zaatarai on intentional infliction of
25 emotional distress, which was produced after the close of

1 discovery -- as he said, it was in summary judgment -- it was
2 interesting. It said various negative things about GPS and then
3 it said something like, "In the halls of ASHRAE, I hear
4 statements about I should go home," or something to that effect
5 which did not actually name who said the statements or even say
6 that anyone from GPS or anyone associated with GPS said the
7 statements.

8 Now generally in a declaration under oath under summary
9 judgment, if you are going to accuse a company or a person of
10 saying certain statements, you say that. You don't suggest that
11 vaguely you heard things unlinked to that person. It was not
12 until the "Go Fund Me" page was the subject of the supplement
13 which suddenly that morphed into the statements were said by GPS
14 numerous times. So -- So, anyway, that -- But I have -- So I'll
15 back up.

16 I raise this only because on the subject of the
17 continuance, the damage to my client is very real, and it is
18 escalating and it is getting worse. These are real people with
19 families, and every day terrible things are being said about
20 them. Mr. Garris' statements are being put on Twitter, him
21 saying, "I did horrible things," and it's got graphics and it's
22 animated when he submitted a declaration saying that was all a
23 lie. But, of course, people aren't going to listen to -- read
24 the fake filings or listen to five hours of tapes. So it's
25 treated as if my client has done something terrible. So because

1 this harm is so severe and it is so constant and it is so hard on
2 the people at our company, we -- we do not want a continuance.
3 We want to go to trial. We want to prove this to a jury, and
4 we're ready to do so.

5 THE COURT: Okay. Okay.

6 MR. JAMES SHIELDS: May I have two minutes on the
7 comments, Your Honor?

8 THE COURT: Yes.

9 MR. JAMES SHIELDS: Three -- Three points, Judge. One,
10 again, as I shared with the court, I'm just a poor country trial
11 lawyer. This is not a continuance ---

12 THE COURT: Blah, blah, blah.

13 MR. JAMES SHIELDS: I am -- I -- I love trying cases.
14 We want to go to trial. They have accused Dr. Zaatari of a
15 hundred percent of the losses, whether those losses resulted
16 because their products don't work or COVID went down or their
17 sales strategy, whatever, whatever, whatever; lots of causation
18 problems. I don't think they can prove causation. We spent the
19 morning on it. We have every desire to go to trial.

20 When -- When counsel said he retracted -- Keith Garris
21 retracted his statements, and I understand the fact that the
22 Court can't rely on the Keith Garris, I have not heard yet that
23 the Defendants -- and I'm not talking about McGuireWoods; their
24 clients -- have fully complied with several court orders. All I
25 want, Judge, is to know exactly what claims I'm trying, what

1 witnesses are going to be allowed, what causes of action we're
2 going to deal with, what elements we're going to prove with all
3 of the documentary and facts that we can use.

4 Reset the case for a very short period of time, Judge,
5 so that not only you can get your rulings but we can understand
6 the facts and know how we're going to try the case. I'm not
7 trying to avoid a trial. I love going to trial. We have to go
8 to trial with all the facts, and I still have not heard all the
9 test results that have been done. Still haven't heard an
10 explanation for redacted e-mails where we need that information.

11 I'm happy not to take the deposition and use unredacted
12 e-mails at trial. Great! I have no problem with that.

13 THE COURT: Okay.

14 MR. JAMES SHIELDS: We simply need the information,
15 though, Judge. That's all I'm asking for.

16 THE COURT: All right. Do you have something?

17 MR. REED: Yes, Your Honor, real quick on behalf of
18 enVerid on the continuance motion, and I'll try to come up here
19 and answer the Court's question as directly as possible.

20 From a practical standpoint, I think that's what the
21 Court last asked, you know, how can we go to trial with the
22 number of issues that are out there pending, given that there's
23 29 statements and multiple claims of causes of action. Just
24 narrowing that down so that we know what we're actually trying
25 and what evidence is going to go to those things would be greatly

1 beneficial.

2 As for the Mr. Garris situation, just like enVerid was
3 brought into this case after -- after a lot of discovery had been
4 conducted, enVerid wasn't a party, and my client wasn't -- and we
5 were not a party to any of these conversations. These -- These
6 tapes as well as the retraction raise some serious issues about
7 the existence of USB drives or hard drives or deleted e-mails and
8 texts that for our client's understanding, to be able to explore
9 those and understand, you know, was he lying, was he not, and to
10 get those documents, if he does still have them, is important,
11 especially on a witness that GPS failed to disclose in their --
12 in their disclosures with this Court. Obviously, this was
13 someone who was involved but they did not disclose him, like some
14 of the others. I mean it's not even that he wasn't even on their
15 late, you know, or their last-minute disclosures which is subject
16 to another motion, this guy wasn't even disclosed. So we have
17 joined the Motion for Continuance on a practical matter,
18 Your Honor, as well.

19 THE COURT: All right. Let's talk practicalities for a
20 moment.

21 I have a criminal case set for November 28th, 2022. I
22 am assured that it is actually going to go, so you're behind
23 that. I have two criminal cases set then. So the prospects of
24 me going then are pretty remote.

25 We don't really have the ability to give you all a

1 special setting like you can get in the state court because the
2 criminal cases that are likely to bump you, if you get bumped,
3 involve people who haven't even committed their crimes yet. So I
4 can't very well predict whether you're going to have a criminal
5 case that's going to get in the way.

6 That was slow. That was a good joke and it took 15
7 seconds. I should hold up the "LAUGH" sign.

8 So the reality is my docket is probably not going to
9 reach you.

10 Now in light of that, do you want to -- Why don't we
11 take a five-minute break here. I'll hear from the Plaintiffs
12 about that.

13 I remain very concerned about causation. I appreciate
14 the points that counsel made about the Lanham Act causation, and
15 that may have an impact on the Court's assessment of that, but I
16 think you all would be best advised for me to let you know who's
17 going to be able to testify and on what before you spend the
18 astonishing amounts that are going to be necessary to try the
19 case.

20 So when I come back here, I'm going to give you some
21 dates when I could try the case with a short continuance, again
22 subject to the age-old criminal case problem. There's little I
23 can do about that. But at this juncture, the case that is set
24 for November 28th is a pretty old case. So if I can find a place
25 for you that's not too far off, that doesn't have an old criminal

1 case set, the likelihood is a new case won't bump you because
2 they rarely go to trial on the first setting just because people
3 aren't ready. So I'll give you a date. I'm not ruling on the
4 Motion for Continuance now, but I'll give you a date.

5 Do you all have your calendars with you?

6 MR. DAVID SHIELDS: Yes, Your Honor.

7 MR. MUCKENFUSS: Yes, Your Honor.

8 MR. REED: Yes, Your Honor.

9 MS. WHEATLEY: Yes, Your Honor.

10 THE COURT: Okay. All right. We'll take a ten-minute
11 recess.

12 COURT SECURITY OFFICER: All rise.

13 (Court recessed from 10:58 AM until 11:07 AM.)

14 THE COURT: All right. Be seated.

15 All right. If I continue the case -- Oh, sorry.

16 MR. MUCKENFUSS: I would say they abandoned the Court.

17 (Defense counsel returning to the courtroom.)

18 THE COURT: All right. I've left my face mask by
19 mistake in my office. Unless -- If anyone objects, I'll go get
20 it. Otherwise, let's go forward. Be seated, please.

21 MR. MUCKENFUSS: It's okay with us.

22 THE COURT: All right. April 3rd is a date that I can
23 give you that has no conflicts, including criminal cases, and I
24 can instruct my Courtroom Deputy not to put any criminal cases
25 there. Does that work?

1 MR. JAMES SHIELDS: Do we know -- And I'm ignorant. Do
2 we know when Easter is?

3 MR. MUCKENFUSS: It is ---

4 THE COURT: I'm liking to find Passover on my calendar.

5 MR. JAMES SHIELDS: Yes, ma'am.

6 MR. MUCKENFUSS: It's the 17th. The 17th.

7 MR. JAMES SHIELDS: Kendal just said it's the 9th.

8 MR. REED: On my calendar but maybe that's wrong.

9 MR. MUCKENFUSS: My calendar says the 17th. Passover
10 starts the 15th.

11 THE COURT: Okay.

12 MR. MUCKENFUSS: I mean ---

13 THE COURT: Okay. Are you saying you can't do that or
14 -- April 3rd.

15 MR. JAMES SHIELDS: I just generally don't like to --

16 Oh, Aaron, go ahead. I'm sorry.

17 MR. TOBIN: Your Honor, I'm not arguing against April
18 3rd, but in all candor to the Court, I want to let the Court know
19 that I am set in a very old case in the Southern District of
20 New York on April 3rd. It was a case that's been -- It's been
21 worked up completely. Motions have been ruled on. There are no
22 outstanding issues in front of the Court. Settlement
23 conversations haven't happened for years. It was a 2017 case
24 that ---

25 THE COURT: Okay. There's just too many of you and me

1 for me to find clear sailing for everybody. It's just not going
2 to happen. If I pick a date and somebody's in trial, then
3 somebody's in trial.

4 MR TOBIN: Okay. I just -- I just ---

5 THE COURT: I'm not going to make you send a
6 substitute, but I'm never -- This is as good as it's going to get
7 for my calendar where I have no conflicts on my calendar to go.
8 That's the first hurdle. I can't believe I found a date that
9 didn't have any conflicts. So unless you know for sure, and you
10 never know for sure with conflicting settings, I'm going to pick
11 a date that may conflict with one of you subject to another trial
12 setting.

13 MR TOBIN: Understood, Your Honor. I just didn't want
14 to not say nothing about it now.

15 THE COURT: No; that's fine.

16 Okay. Any other problems?

17 MR. MUCKENFUSS: April 3rd is fine with us, Your Honor.

18 THE COURT: Okay.

19 MR. DAVID SHIELDS: May I offer a light-hearted
20 consideration?

21 THE COURT: A what?

22 MR. DAVID SHIELDS: A light-hearted consideration that
23 doesn't actually weigh against the 3rd?

24 My wedding is the second Saturday of this current
25 trial, and that would be my honeymoon, but that's okay. We'll --

1 We'll -- I'm sure my fianceé will understand.

2 THE COURT: This is your honeymoon, April 3rd?

3 MR. DAVID SHIELDS: April 3rd, yeah, but that's okay;
4 really. We'll -- We'll -- It's already been moved around once.
5 It will get moved around again. The trials of the wedding date
6 which is not usually, you know, not something you want to
7 publicize, has moved twice because of new -- a new nephew.

8 THE COURT: Well, I'm not going to set a case during
9 your honeymoon.

10 MR. DAVID SHIELDS: No. Your Honor, honestly we're --
11 we're -- we don't ---

12 THE COURT: But you would be better off to be blaming
13 this on me because it's all being written down rather than saying
14 it's fine with you if I set the trial the date of your honeymoon.

15 MR. DAVID SHIELDS: That's right. Can we -- Can we
16 have that stricken from the record, please?

17 MR. JAMES SHIELDS: As the father-in-law of his future
18 bride, Your Honor, --

19 THE COURT: Yes.

20 MR. JAMES SHIELDS: -- I'm going to let him tell her,
21 not me.

22 THE COURT: The record will reflect that Mr. Shields
23 begged, pleaded, got down on the floor, made an impassioned plea,
24 and the Judge said, "Tough nuts!"

25 No; seriously, I mean I don't -- I would never do that.

1 So you -- you tell me whether you -- Why don't you think about it
2 for a minute.

3 MR. DAVID SHIELDS: Well, Your Honor, if the next trial
4 date is May, I might request to do that.

5 THE COURT: I've got a zillion conflicts in May.

6 MR. DAVID SHIELDS: Well, that's what I'm saying. If
7 the next trial date is then July, then we'll go forward in April.
8 I'm not going to let one person's ---

9 THE COURT: Okay. How long are you going to be away?

10 MR. DAVID SHIELDS: Three weeks. And it starts on the
11 10th. But, Your Honor, honestly, we -- we -- I'm being very --
12 very serious and very candid with the Court. We can do it in
13 May.

14 THE COURT: April.

15 MR. DAVID SHIELDS: No, no. We can do the honeymoon in
16 May.

17 THE COURT: Oh, okay.

18 MR. DAVID SHIELDS: No, no. I don't think the -- I'm
19 not trying to tell the Court when the trial can start.

20 THE COURT: My May is just not good. I'm not going to
21 be able to find a May slot for you.

22 All right. I'm going to put it there based on counsel
23 stating that I'm not going to make his marriage over before it
24 begins.

25 MR. DAVID SHIELDS: That's not going to happen,

1 Your Honor. I'm very fortunate. That should definitely stay on
2 the record.

3 THE COURT: All right. Okay. I'm going to let you
4 ruminate on that. If I am resetting the case, I'm going to give
5 you an opportunity by tomorrow to say, "I've changed my mind;
6 don't set it for my honeymoon," and then I won't, but I can't
7 commit to another date right now. I had to work this out with my
8 Courtroom Deputy. It's pretty rare for me to find a date where I
9 don't have any criminal cases ahead of you, and then my calendar
10 is clear. The civil cases, there are some civil cases there but
11 I will put you ahead of them, if I reset it.

12 So are there any other issues on April 3rd?

13 MR. MUCKENFUSS: Not from us.

14 THE COURT: All right. So, Mr. Shields, you've got
15 veto power here.

16 MR. DAVID SHIELDS: Actually I don't have veto power,
17 Your Honor, but ---

18 THE COURT: Your fianceé.

19 MR. DAVID SHIELDS: My fianceé's got the veto power,
20 yes.

21 THE COURT: So I'm going to let you tell me tomorrow if
22 you want me to find another date. And then if you do, I'll run
23 that other date by all of you rather than spend your time with me
24 going back over my calendar now because I'm afraid I'm going to
25 hit something no matter what I do.

1 Okay. Yes.

2 MR. MASSO: Your Honor, I just -- if I could respond
3 very briefly to that brief argument on causation under the Lanham
4 Act.

5 THE COURT: Yes. I'm going to let you do that in just
6 a minute.

7 MR. MASSO: That's fine.

8 THE COURT: All right. What I propose to do now is --
9 We've got 45 minutes. I'm going to give 20 minutes to each side.
10 Each of you can argue whatever you want, responding to each other
11 or any of the pending motions that we have not addressed.

12 I'm going to give each of you one week to file ten
13 pages of supplement to your existing briefing. No responses to
14 each other. Ten pages of supplement to your briefing, limited to
15 issues that were discussed today. Other than that, no additional
16 briefing.

17 And if I find something new in your briefing, I will
18 not read your brief at all. Okay?

19 So I'm going to repeat that. You can have ten pages to
20 add to the briefing record on matters that were discussed today
21 and nothing else. And if you add something else, I will not read
22 your brief. Okay?

23 All right. So I'll let the Defense go first since it's
24 your motion, but you may address any of the other motions that
25 are pending, whoever filed them. Twenty minutes.

1 MR. MASSO: Thank you, Your Honor. I'll be brief and
2 then yield the rest to the rest of the team.

3 But just responding to the argument about causation
4 under the Lanham Act, the Lanham Act does require proximate
5 causation, so it's actually a slightly higher standard than some
6 of the other causes of action.

7 The issue that Plaintiffs have is that there is still
8 not evidence in the record to support what they need to prove.
9 There was discussion about these people calling in and saying,
10 "We read the Open Letter and we're canceling as a result." None
11 of that, again, is actually there. We know the three documents
12 that were referenced on Page 46 of their response. That's the
13 only evidence, and it talks about one event happening and then
14 another event happening. There still is no time ---

15 THE COURT: Well, Mr. Boyd and Mr. Brinckman's
16 declarations say what customers said. The point that counsel was
17 making is that that can be -- that can come in as an exception to
18 the hearsay rule for purposes of notice to customers which would
19 not be hearsay.

20 MR. MASSO: Okay. And -- And that may be fair, but
21 they still have the causation problem. They still have the link
22 of: Did any of it happen because of those statements? And
23 that's what they've never been able to produce, whether from the
24 customers or from somebody inside quoting the customers. They
25 still don't have that link.

1 Of course, we have other problems with their Lanham Act
2 claim, not the least of which is the fact that these did not
3 occur in a commercial -- in commercial advertising or promotion.
4 That's a different issue that we haven't addressed. I don't want
5 to get into it, but just remind the Court that that's also ---

6 THE COURT: Well, you've -- you've addressed that in
7 your briefing --

8 MR. MASSO: We have.

9 THE COURT: -- whether it's in a commercial context and
10 whether GPS is a limited public figure.

11 MR. MASSO: Yes.

12 THE COURT: Okay.

13 MR. MASSO: I just wanted to make the point that the
14 evidence simply isn't there for what they need to make that
15 "because of" tie.

16 THE COURT: Okay.

17 MR. DAVID SHIELDS: May it please the Court.

18 David Shields again. Hopefully a little more downplay on this
19 time. Your Honor, two quick points, one on the evidence of
20 the ---

21 THE COURT: Just a reminder: I'm not inquiring about
22 vaccination status, but if you've been vaccinated, you can take
23 your mask off.

24 MR. DAVID SHIELDS: Oh, thank you, Your Honor. I have
25 been vaccinated.

1 So, Your Honor, I have in front of me right now the
2 declaration of Tim Boyd that we've discussed, and I just wanted
3 to make a counterpoint to counsel's argument for GPS that that is
4 an exception to the hearsay rule; that the customer's state of
5 mind -- Two points.

6 One, Paragraphs 9, 10 and 11 of -- on APPX1811 of Tim
7 Boyd's declaration are very clear that -- that Mr. Boyd did not
8 have conversations with those representatives, making it hearsay
9 within hearsay. That's the first point which, obviously, one
10 exception, without conceding that that exception applies, one
11 exception only clears one level of hearsay.

12 The second point is: Even assuming that Mr. Opie and
13 representatives of Bard HVAC and others in Paragraph 11 of
14 Mr. Boyd's declaration, even assuming that those individuals
15 spoke to Mr. Boyd, the Defendants have filed objections to those
16 statements on the basis not just of hearsay but on
17 authentication, on the fact that that's a conclusory statement
18 because it doesn't identify any foundation on which he would have
19 personal knowledge of those conversations. It doesn't identify
20 the people, when they happened, what the nature of the contract
21 was, what the date of the contract was. None of those supporting
22 facts make this competent testimony in support of the causation
23 element.

24 And then finally, I would just note with regard to
25 those specific customers -- let's see -- Carrier, Bard HVAC, S&P

1 USA, JCI, Daikin, Greenheck and others, at least with regard
2 to -- not Carrier but Paragraph 11, none of those customers,
3 alleged customers, were disclosed by GPS at any point.

4 So Your Honor asked a good question which is:

5 Defendants, why didn't you take those depositions? Well, we
6 didn't know they existed, so.

7 THE COURT: You're telling me that as of today, you
8 have requested and not seen evidence of customers who allegedly
9 canceled their relationships with GPS or did not consummate a
10 relationship with GPS because of the alleged misrepresentation,
11 the defamatory statements?

12 MR. DAVID SHIELDS: That information has been
13 requested. The bulk of it, 60 percent, including, you know,
14 communications with many potential customers that are now being
15 claimed, was produced on August 17th and then again on October
16 17th, two and four months after the discovery deadline.

17 THE COURT: Okay. You said none of those customers
18 were disclosed by GPS at any point?

19 MR. DAVID SHIELDS: No. They were not contained in the
20 disclosures, Your Honor, as -- as people with relevant knowledge
21 of facts that could support the claims.

22 THE COURT: Well, on the -- At the end of discovery,
23 you were given documents that revealed their names. Is that
24 true?

25 MR. DAVID SHIELDS: With regard to these specifically,

1 the only discovery that I'm aware of that would have these
2 customer names on it was produced on October or -- excuse me --
3 August 17th after the discovery deadline. You know, there's
4 225,000 pages' worth of documents produced by GPS, the vast
5 majority after the discovery deadline. If there was a casual
6 reference to one of these companies in one of the e-mails within
7 the hundreds of thousands of pages produced prior to the
8 discovery deadline, I'm not going to represent to the Court that
9 that didn't happen.

10 THE COURT: So these -- these people -- these entities
11 were not mentioned in the deposition of Mr. Boyd and
12 Mr. Brinckman?

13 MR. DAVID SHIELDS: I'm not aware of that, Your Honor.

14 THE COURT: Okay. All right. Thank you.

15 Okay. Okay.

16 MR. DAVID SHIELDS: Your Honor, I'd like to discuss the
17 Motion to Strike Mr. Mimms unless Your Honor feels the briefing
18 is sufficient. And if that's ---

19 THE COURT: Oh, go ahead.

20 MR. DAVID SHIELDS: I have nothing to add -- nothing to
21 add to the briefing. But just very briefly, Mr. Mimms is a
22 little bit of an interesting case because the Plaintiff disclosed
23 Mr. Mimms and his expert's opinions not just on damages but they
24 called it "correlation;" that he was going to testify to the
25 correlation between Defendants' statements and the lost profits,

1 and that's in their expert disclosure that was filed as Document
2 No. 92. So some element -- You know, "correlation" is not
3 "causation." That's a -- That's a truism that is even more
4 relevant right now in the COVID era, but there's some element of
5 linkage between the Defendants' allegedly defamatory and false
6 statements and the lost profits that the Defendants intend, at
7 least that they disclosed, intend to proffer Mr. Mimms about this
8 idea of correlation. Of course, correlation does not satisfy any
9 element of causation in this -- of any of the causes of action,
10 even the standard discussed under the Lanham Act.

11 So what's apparent in Mr. Mimms' report and Mr. Mimms'
12 deposition and Mr. Mimms' rebuttal report is he goes at length to
13 talk about the idea that -- to link these statements between
14 defamation -- the allegedly defamatory statements and the
15 damages, and he talks about "but for" causation, and he talks
16 about "but for" causation for two reasons.

17 One, he was disclosed as a, you know, as an expert
18 witness that's going to offer testimony to correlate the
19 statements in the damages in Document No. 92. That's the first
20 reason.

21 The second reason is: His profession as a member of
22 the American Institute of Certified Public Accountants and
23 others. The AICPA standards require that you make a causal, not
24 a correlative, a causal connection between the alleged bad acts
25 of the Defendant and the lost profits.

1 So there are many grounds in the Motion to Strike
2 Mr. Mimms, but one primary one that is of critical importance for
3 -- for striking Mr. Mimms is that his testimony would, one, be
4 totally unreliable because he uses a standard "but for" that is
5 not only unsupported by the case law of the different
6 causation -- causes of action at issue, it's not supported by the
7 AICPA standard. And that standard is listed in our brief.

8 And the second thing is -- about that is: We think
9 that the testimony could be incredibly prejudicial and confusing
10 to the jury if he was permitted, as he suggested in his report
11 and at his deposition and in his rebuttal report, that he put
12 forward this "but for" causation standard, which is a totally
13 errant standard under the Lanham Act, any other cause of action,
14 or the AICPA.

15 So I just wanted to discuss that point specifically.
16 We'll stand on the rest of the brief.

17 THE COURT: Okay.

18 MR. DAVID SHIELDS: Thank you, Your Honor.

19 MR. REED: Just a few things, Your Honor.

20 Of the 29 statements that are at issue in this case,
21 only one is directly attributable to enVerid, and that is a
22 retweet. So enVerid has been brought into this case on this idea
23 of what the Court mentioned earlier, this conspiracy, which when
24 deposed, Mr. Boyle, Mr. Brinckman, the corporate reps, had no
25 direct evidence of any direction, of any control by Mr. Weeks or

1 anyone at enVerid of Ms. Zaatar making these statements. Their
2 only way to try to attribute any type of liability to enVerid
3 when they brought them into this is to connect the red strings
4 and try to create inference upon inference to try to get enVerid
5 into this case.

6 What's telling is: For the other motions that are
7 before this Court as far as supplementing, as far as the
8 continuance, all of these actions, not one allegation is enVerid
9 involved in any of those posts, any of those -- of those disputes
10 between Dr. Zaatar and GPS.

11 So based upon the summary judgment, Your Honor,
12 enVerid -- because there is no linkage there between any action
13 by enVerid to cause the damages that -- that GPS is seeking here
14 today, Your Honor, the summary judgment could be granted as to
15 enVerid and remove it from this ongoing dispute here which, as a
16 small player in all this mess, they don't have a McGuireWoods.
17 They've got Condon Tobin here. The time and expense that they've
18 had to ---

19 THE COURT: You're not going to put up with that, are
20 you, Mr. Tobin?

21 MR. TOBIN: No. I put up with way worse, Your Honor.

22 MR. REED: Judge, in all fairness, we can bring him up
23 here to swear he told me that, you know, to -- to -- to say that.

24 But the fact is we're being drug along in this,
25 Your Honor. And so the helpfulness here and with the looking

1 forward here as to -- based upon the pleadings that we've hit
2 there, the lack of causation, the lack of damages resulting from
3 any of those statements, and when the Court sees those individual
4 statements, and we're talking about 29, being able to narrow
5 those down and look at those, and on only one, and it's a retweet
6 which, you know, we briefed is not actionable against enVerid,
7 Your Honor, we'd ask that you grant summary judgment.

8 As to Mimms, we echo their -- he's unreliable. He
9 basically, in effect, said, "I'm picking a reference period based
10 upon the representations of GPS;" did no independent analysis
11 whatsoever other than saying, "Yeah, I think it looks good," and
12 then projected with no analysis that this would continue, despite
13 information and documents that show that even GPS believed that
14 -- that they would not -- that their market wouldn't continue at
15 those levels. The unreliability of his -- of his opinion would
16 require striking him and his testimony.

17 Thank you, Your Honor.

18 MR. MASSO: EnVerid made their pitch to get out. I'm
19 going to make a pitch on behalf of D Zine.

20 The theories against D Zine in the Plaintiff's most
21 recent ---

22 THE COURT: Is it incorporated?

23 MR. MASSO: It is an LLC. It is D Zine Partners, LLC.

24 THE COURT: And who are the partners?

25 MR. MASSO: I don't -- I know that Dr. Zaatari and

1 Mr. Studer who is here with us today.

2 As best we can discern from Plaintiff's most recent
3 Complaint, the only theory asserted against D Zine was
4 conspiracy. They are mentioned in the conspiracy section of the
5 Complaint. They're not mentioned with any significance anywhere
6 else.

7 We moved for summary judgment on Plaintiff's conspiracy
8 theory against D Zine. In response, they said they weren't
9 asserting conspiracy. They were only asserting agency. The
10 problem with that, Your Honor, is they don't assert agency
11 against D Zine. They don't assert that Dr. Zaatar is an agent
12 of D Zine anywhere in their Complaint. They do assert, of
13 course, that Dr. Zaatar is an agent of enVerid. They make that
14 very clear and make very specific allegations in support of that
15 claim, but they don't say anything about Dr. Zaatar being an
16 agent of D Zine. In fact, they almost make it the other way
17 around. They refer to D Zine being an instrumentality of
18 Dr. Zaatar that she uses.

19 We don't believe there's any pleadings at this point
20 that would support liability against D Zine. They've conceded
21 conspiracy, they're not going to pursue. So I don't believe
22 there's any reason D Zine should remain in the case.

23 THE COURT: All right. Thank you.

24 Oh, I think Mr. Shields -- They have a couple of
25 minutes left.

1 MR. MUCKENFUSS: Oh, I'm sorry. Apologies, sir.

2 MR. JAMES SHIELDS: No advocacy, Judge. Just one ---

3 THE COURT: Country lawyer.

4 MR. JAMES SHIELDS: Just country lawyer. You're going
5 to remember that.

6 THE COURT: Yeah, I will. It's not the first time I've
7 heard that, though.

8 MR. JAMES SHIELDS: Oh. It's a little unique. I
9 mentioned that last week to somebody and they just -- I'm not
10 going to tell you what they said on the record, but it, you know,
11 it started with a "b" and ended with an "s" and gave me a hard
12 time about it.

13 Anyway, case management. We would like confirmation
14 that the June 15th Order requiring studies, data, summaries, test
15 results, reports from all labs be complied with.

16 The level of -- Number two, the level of redaction of
17 communications which came in after the ---

18 THE COURT: Have you filed a motion on that?

19 MR. JAMES SHIELDS: We have.

20 THE COURT: You filed a motion that the redactions are
21 excessive?

22 MR. DAVID SHIELDS: Yes, Your Honor.

23 MR. JAMES SHIELDS: We did. It was scheduled before
24 Judge -- Magistrate Ramirez and I think it -- and she denied it
25 but without no hearing, in anticipation of this hearing, because

1 she didn't know what was going to happen with the trial setting.

2 THE COURT: Okay.

3 MR. JAMES SHIELDS: And so that's a -- that's a
4 material issue. And then I can't tell the Court right now that
5 if there are more lab results that come as a result of the Court
6 requiring GPS to certify under oath that it's complied and all
7 that, all the conversation we've already talked about, which I've
8 never heard of, by the way, Judge, but I fully support, of
9 course, I don't know yet if we need one deposition or two or
10 three or five. I can't tell the Court that absent receiving
11 those unredacted documents, you know, receiving any additional
12 test results and then having the Court's ruling. So really it's
13 a question, Judge, more than anything else, those three issues.

14 I rarely do this but I'm going to do it today. Do you
15 have like a schedule of when you think -- We're going to submit
16 this ten pages within a week. Can we expect rulings from the
17 Court in the next 30 days so that we can then ---

18 THE COURT: Good try.

19 MR. JAMES SHIELDS: I'm trying, Judge. I'm tap
20 dancing. Okay?

21 THE COURT: Even though I can't see your feet.

22 MR. JAMES SHIELDS: I know. I'll come over here so you
23 can hear me tap dance.

24 THE COURT: I'll do the best I can.

25 MR. JAMES SHIELDS: Okay. So that -- that -- So it's

1 purely a case management issue on those three items, the June
2 15th -- compliance with the June 15th Order, unredacted e-mails
3 because there's no log or anything, and then some guidance on
4 perhaps additional discovery that we may need in advance of April
5 3rd.

6 Thank you. That's all I have.

7 THE COURT: All right. Now you have it,
8 Mr. Muckenfuss. Thank you.

9 MR. MUCKENFUSS: Thank you, Your Honor. I've got a
10 country lawyer in Condon Tobin. I think I need some kind of --
11 some brand on my part.

12 THE COURT: Why here comes that hick, Mr. Muckenfuss.

13 MR. MUCKENFUSS: Yeah. And that's McGuireWoods, I
14 guess, whatever that means.

15 So, Your Honor, just ---

16 THE COURT: You're not Sullivan Cromwell.

17 MR. MUCKENFUSS: No, we're not Sullivan Cromwell.
18 That's true.

19 So I will split my time with Ms. Wheatley who will also
20 address the Court. I wanted to just go back, Your Honor. You
21 had asked some questions of me at the beginning around causation.
22 I did want to refer the Court to some specific citations to help
23 the Court.

24 THE COURT: All right.

25 MR. MUCKENFUSS: Mr. Brinckman -- This is at Appendix

1 97.

2 Mr. Brinckman testified, "So GPS signed, as the letter
3 states, a Memorandum of Understanding to join together in a
4 business venture to supply GPS products to various entities of
5 Carrier. And they call it Carrier Commercial Services. We were
6 on the way. We were developing product for them, testing. They
7 received a copy of the Open Letter penned by Ms. Zaatar, and
8 they subsequently, after review, decided to cancel the agreement
9 with GPS."

10 So that is at Appendix 97, Mr. Brinckman's deposition.

11 So, Your Honor, that -- you had asked me some
12 questions. I may not have been as precise. That is evidence
13 from Mr. Brinckman testifying that Carrier received the Open
14 Letter from Ms. Zaatar and then decided to cancel the agreement
15 with GPS.

16 THE COURT: Okay. Now I know you're not conceding that
17 the Court's expressions of concern about the hearsay rule are
18 correct. But if they are correct, it's, I think, clear that that
19 statement is the product of a hearsay conversation.

20 MR. MUCKENFUSS: Yes, Your Honor.

21 THE COURT: I mean if he had said, "I had a conference
22 with them. While we were in the conference room, an assistant
23 brought in a letter and they opened it in my presence," then he
24 would have direct personal knowledge that they had received the
25 letter. I'm presuming that they told him they had received it.

1 MR. MUCKENFUSS: I understand -- I understand the
2 Court's point about that.

3 THE COURT: Okay.

4 MR. MUCKENFUSS: But not to ---

5 THE COURT: No, I understand you're arguing it doesn't
6 matter.

7 MR. MUCKENFUSS: Yes. And Ms. Wheatley maybe stated it
8 better than I did, but, obviously, the -- it's -- 8033 would
9 cover the hearsay exception. I know we cited Your Honor's case
10 in the Fifth Circuit. We cite a Third Circuit case, the same
11 kind of case, quoting, "Statements of a customer as to his
12 reasons for not dealing with a supplier are admissible for this
13 limited purpose."

14 So those statements, if made to Mr. Brinckman,
15 Mr. Boyd, would be admissible under 8033 for that limited
16 purpose.

17 THE COURT: What limited purpose?

18 MR. MUCKENFUSS: For the limited purpose, "i.e., the
19 purpose of proving customer motive."

20 THE COURT: Okay.

21 MR. MUCKENFUSS: And that was a quote from that case.

22 THE COURT: Okay.

23 MR. MUCKENFUSS: So in this case, it would the motive
24 as to why they were canceling or not going to do business with
25 GPS. And, obviously, the Fifth Circuit case that Ms. Wheatley

1 quoted, the *Morris Jewelers* case as well is cited, Page 46,
2 Footnote 2 of our brief.

3 Your Honor, I would also -- Your Honor had invited me
4 to provide appendix cites on the agency conspiracy claim. I
5 would -- I would like to do that. I'll just read the appendix
6 cites. I'm happy -- I will summarize this evidence but, again,
7 there are -- The record is replete with e-mails with enVerid.
8 Specifically Mr. Weeks and Dr. Zaatari have direct communications
9 about what she is doing in terms of her efforts to publicize and
10 publish statements about ionization and GPS.

11 For example, this is Appendix 508, an e-mail from
12 Dr. Zaatari. It's at her gmail account to Christian Weeks at his
13 enVerid account. She is sending him links about a fundraising
14 campaign to test a GPS device and provides a press release
15 relating to testing of a GPS device. That's at Appendix 508.

16 Appendix 504 are further e-mails of Mr. Weeks relating
17 to Dr. Zaatari's efforts, and there are references to
18 Dr. Zaatari's public statements and links to her Open Letter that
19 are in -- in that e-mail.

20 Appendix 506 -- I'm sorry.

21 Appendix 564, enVerid, when Dr. Zaatari posted one of
22 her most damaging tweets reputationally which was referred to as
23 the "tobacco tweet," enVerid liked the tweet on their own social
24 media platform, and Heather Robb testified to that. She admitted
25 and agreed that they had liked Dr. Zaatari's tweet. And that's

1 at Appendix 564.

2 THE COURT: What is that --

3 MR. MUCKENFUSS: I'm sorry?

4 THE COURT: What do you argue that that shows?

5 MR. MUCKENFUSS: Well, again, it's -- it's the
6 combination from a conspiracy standpoint. It's the overt acts
7 and the combination of enVerid and Dr. Zaatar and her efforts to
8 publicize -- I mean it's not the only evidence, obviously, but
9 it's part of a list of e-mails and other acts by enVerid to join
10 with Dr. Zaatar and her acts to publicize the -- the attacks on
11 -- for the common purpose of attacking GPS. And, again, I had --
12 I had cited to the e-mails that -- of Mr. Weeks where he talks
13 about enVerid wants to attack GPS. I reference the -- the e-mail
14 where he talks about -- and he talks to Dr. Zaatar about this,
15 about coming out and saying that GPS' technology produces harmful
16 by-products. That's an e-mail from Christian Weeks. That is not
17 solely a Dr. Zaatar e-mail.

18 THE COURT: What's the -- What's the reference to that?

19 MR. MUCKENFUSS: We're getting it now.

20 THE COURT: That's all right. Whoever finds that can
21 just stand up and give me the number.

22 MR. MUCKENFUSS: Thank you, Your Honor.

23 Appendix 510 is an e-mail where Christian Weeks
24 forwards an e-mail from Heather Robb. So Heather Robb has an
25 internal enVerid e-mail where they are talking about their plan

1 in terms of the public statements and some of the media
2 statements about ---

3 THE COURT: Yeah. That's what I was looking at before.

4 MR. MUCKENFUSS: Yeah, that was the one before. And
5 Christian Weeks forwards that to Dr. Zaatari.

6 There is Appendix 315 through 317. These are e-mails
7 again. These are Christian Weeks' e-mails internally in terms of
8 the plan that they have to publicize attacks and to specifically
9 attack bipolar ionization in GPS' products.

10 THE COURT: Okay. So this happens all the time. The
11 key document that I'm supposed to be looking at is not actually
12 here. This could be -- Did we copy these or ---

13 LAW CLERK LAURA: Yes.

14 THE COURT: So we may have missed it. I go from 299 to
15 322. So just make a note, better go back, and I'm assuming
16 that's our error.

17 So go ahead, counsel.

18 MR. MUCKENFUSS: And then in our supplemental briefing,
19 Your Honor, we'll list -- we can list the specific cites as well.

20 But just in terms of the conspiracy agency claim,
21 Your Honor, there again, the basic evidence in this case and the
22 clear evidence is that Dr. Zaatari's working and getting paid by
23 enVerid, and there are timesheets that Dr. Zaatari had as well.
24 Part of her efforts within ASHRAE were specific to what enVerid
25 was asking her to do which was to actually make -- make things

1 more difficult for -- for GPS and ionization. That was what
2 enVerid was directing her to do. That's what enVerid asked her
3 to do, and that's what the e-mails show. So they certainly had a
4 common agreement, a common design to specifically attack GPS and
5 ionization, and they did that with false statements about GPS'
6 products and technology.

7 The one thing I want to also point out, Your Honor,
8 with regard to the conspiracy evidence, obviously, all of the
9 conspiracy evidence: My client wasn't aware of this when it was
10 happening, of course. All of the evidence was produced by the
11 Defendants in this case. So certainly when -- when, for example,
12 Mr. Boyle was asked, "Were you aware of the conspiracy at the
13 time?"

14 "I, obviously, wouldn't be aware of the conspiracy at
15 the time," as that was hidden from GPS, but I just wanted to know
16 that all of the evidence that supports the conspiracy claim
17 certainly are derived from the documents that are produced by the
18 Defendants in this case.

19 I want to address the comment about the list of
20 customers in Mr. Boyd's affidavit. There was a comment that the
21 Defendants were not provided with a list or some identification
22 of these customers. I think counsel was careful to say it wasn't
23 in the disclosures, but in point in fact, we produced a summary
24 list of what we contend were all of the lost customers as a
25 result of Dr. Zaatari's statements. We provided that list to the

1 Defendants prior to Mr. Brinckman's deposition, his 30(b) (6)
2 deposition. That list -- They actually asked Mr. Brinckman many
3 questions about that list in his deposition. So it's not true
4 that these lists of customers that we contend we lost -- and it's
5 a long list. I mean it was probably just, you know, 40 or so or
6 more or 50 customers on this list that we contend were lost as a
7 result of these. So to -- It is -- It's not accurate to say that
8 they weren't aware of the list, the identity of customers that we
9 contend were lost, as they questioned Mr. Brinckman about that.

10 The other thing I would note, Mr. Boyd's -- This --
11 Again, there was a comment about double hearsay within
12 Mr. Boyd's. In Paragraph 9 of his affidavit, he directly states,
13 "I started hearing from GPS' customers expressing concern and
14 asking questions about these statements."

15 So in Paragraph 9 of his affidavit, he states in early
16 2021 he heard directly from GPS' customers about Dr. Zaatari's
17 statements. So it is not -- He's very clear. He's not vague in
18 terms of hearing those from the customers. In Paragraph 11 he
19 lists the customers and he lists the specific names of people at
20 these customers that he talked to. So this -- There is a
21 reference to his affidavit being vague and unclear. That is --
22 That is not true.

23 In Paragraph 11 he states, "Representatives of other
24 customers and potential customers spoke with me by phone and
25 indicated that they could not do business with GPS following

1 Zaatari's negative statements."

2 So I think his affidavit, you know, putting aside,
3 Your Honor, the hearsay discussion we had, we, obviously, believe
4 these are not -- this falls within the exception of the hearsay
5 rule, but those are direct statements by customers to Mr. Boyd
6 stating that they had reviewed and, you know, decided not to do
7 business with GPS because of Zaatari -- Dr. Zaatari's statements.

8 Just very quickly on Mr. Mimms.

9 We are not certainly going to put Mr. Mimms up as to
10 causation. I believe Mr. Mimms testified in his deposition that
11 he was not opining as to causation. I think we cited a lot of
12 cases in the brief. I won't go through those.

13 The expert's entitled to assume liability or to assume
14 causation which he does for the purposes of his calculations, but
15 he is not going to opine certainly independently as to causation.
16 So that -- I don't believe that's a valid reason for striking
17 Mr. Mimms. His testimony is valid in terms of his analysis and
18 review of the financial statements and to the chronology of what
19 happened to GPS after these statements came out from Dr. Zaatari.

20 I believe, Your Honor, those are the comments I had.
21 I'll turn it over to Ms. Wheatley.

22 THE COURT: Okay. While Ms. Wheatley is coming up
23 there, let me make a couple of comments.

24 The motion to exclude Dr. Zaatari from making
25 statements that might be considered in the nature of expert

1 testimony is denied.

2 I want to make sure you all understand: It is not my
3 practice to, quote, "certify," closed quote, an expert. So if
4 you all say, "I tender Dr. Zaatar," or anyone else as an expert
5 and expect me to say something to the jury about them, I won't.
6 So I'm not granting that motion. That motion will be denied.

7 It -- Clearly her expertise goes to the issue of
8 malice, if nothing else. So I'm not granting that motion. That
9 motion will be denied. But I want to make sure, since you're
10 talking about experts, I don't certify them.

11 MR. MUCKENFUSS: That was sort of -- That was our
12 concern in terms of the -- right, the Court's comment as to her,
13 but I understand the Court's ruling.

14 THE COURT: Yeah. I'm not -- I'm not granting that
15 motion.

16 MR. MUCKENFUSS: Thank you, Your Honor.

17 THE COURT: And along the same lines of -- I'm not
18 granting the motion not to allow Ms. Lee. I can't remember if
19 it's Dr. Lee. Those issues that you raise about her in the
20 Court's view go to weight. So that motion is also going to be
21 denied.

22 All right. Okay. Ms. Wheatley?

23 MS. WHEATLEY: Just a few points. Opposing counsel
24 raised the issue of proximate causation as the standard for a
25 Lanham Act claim. That is not an element of a Lanham Act false

1 advertising claim. It's not one of the elements that Defendants
2 recited in their briefs. It is not in the statute. In fact,
3 there's only that it is likely to cause harm.

4 And I would point out that there is an important
5 distinction here. Defendant -- Neither Defendant moved to strike
6 GPS' false advertising damages claim. They made statements on --
7 They made arguments on causation which I had discussed were --
8 were not relevant to the Lanham Act claim, but they didn't move
9 to strike the damages claims. So that issue was not actually
10 before the Court in the briefing. So the kind of issue of the
11 link GPS has to show to get damages was -- was simply not there.
12 And, of course, you can go to trial with no damages. Now we feel
13 like we have very good evidence that we've been extremely
14 damaged, but I did want to raise that in sort of the scope of the
15 summary judgment hearing what we were responding to with respect
16 to those particular claims.

17 The other point I did want to raise with respect to
18 what can go to the jury on causation and injury with respect to a
19 Lanham Act claim, the *Eastman Chemical* case, the district court
20 decision in 969 F.Supp 2d 756, and then it was affirmed by the
21 Fifth Circuit, is similar to this case in a number of respects.
22 And I would direct the Court to what that case said about how the
23 jury could rightfully find that the Plaintiff was injured by the
24 statements, and it talked about testimony about estranged
25 relationships with customers. It talked about a customer falling

1 from the No. 1 customer to off the list of "Top Ten Customers."
2 It talked about evidence that these statements had been
3 communicated to customers, and it talks about evidence that the
4 statements had been widely disseminated. I'll touch briefly --
5 And so we think that in our summary judgment briefing, we've put
6 forward all of those things, and those facts certainly should go
7 to a jury on the issue of damages.

8 We've also put forward a corrective advertising number
9 that is in Mimms' report that also goes to the issue of damages.
10 That is a particular type of damages to the Lanham Act claim.

11 I also want to briefly touch upon whether this is
12 commercial advertising.

13 Mr. Muckenfuss went through the great deal of
14 communication between Zaatri and the marketing employees or
15 consultants at enVerid and how they encouraged her to make these
16 statements. And that in -- Certainly in this industry, how you
17 advertise your products is -- Social media, of course, is a major
18 way of advertising. You give presentations. We have evidence
19 that Dr. Zaatri gave presentations or she specifically talked
20 about GPS and made claims about GPS. The March DOE presentation
21 has a number of slides directly on GPS which make very
22 unequivocal factual statements about GPS.

23 So in the same presentation, it touts filtration and
24 the type of products that enVerid and D Zine sell, and the
25 presentation also lists D Zine as in the title page of the

1 presentation. So there was some discussion of that link to
2 D Zine. That would just be one example.

3 Also, it would be the fact that D Zine's website links
4 to Dr. Zaatar's Twitter feed. So if you go to the website and
5 you click on the Twitter button, it doesn't go to a D Zine page.
6 It goes to Dr. Zaatar's page that has been at issue throughout
7 this case. So we would point that out as another example of this
8 link here amongst the parties.

9 I'd like to just briefly respond to -- I'm very sorry.
10 I can't remember everyone's names but opposing counsel's comments
11 on the continuance.

12 We don't think there is any grounds here to reopen
13 discovery. Frankly, the fact that he wasn't clear if it was one
14 deposition or several depositions, you know, we don't think that
15 is the way to -- Part of the issue here is that there are so many
16 motions.

17 THE COURT: Well, let me short-circuit this. You all
18 will confer, assuming the case is reset for April 3rd, about
19 additional requests for discovery, and you'll advise me within a
20 week if there remains a dispute about that. And if there is,
21 Judge -- I will refer that to Judge Ramirez because she's got
22 more information about what's already happened than I do.

23 MS. WHEATLEY: Thank you, Your Honor. So confer and
24 advise you within one week as to whether there are further
25 discovery disputes.

1 THE COURT: Yes.

2 MS. WHEATLEY: Understood. And actually that does
3 bring me to a few housekeeping.

4 THE COURT: Sure.

5 MS. WHEATLEY: My team asked me very fervently to
6 confirm the November 14th deadline for all the objections to the
7 pretrial filings since -- Should we consider that off?

8 THE COURT: Yes. That would be like me cracking the
9 whip and asking the lions to get all up on the chairs and then
10 there will be no circus.

11 MS. WHEATLEY: That's fair enough, Your Honor. We
12 really appreciate that.

13 THE COURT: No. I'll back the -- I'll back the
14 deadlines off. The trial date, we're going to wait to see what
15 the absent fianceé says about a trial date before I set it. But
16 once -- If I set it for then, I will give you the other dates
17 that go with it.

18 MS. WHEATLEY: One more housekeeping that I just want
19 to make sure.

20 THE COURT: The pretrial that is scheduled is not going
21 to happen.

22 MS. WHEATLEY: The ten-page supplement, is that also
23 one week? I just don't think we caught the deadline for that.

24 THE COURT: I would say a week from Monday.

25 MS. WHEATLEY: A week from Monday, okay.

1 THE COURT: Let me make sure I have not put you at
2 Thanksgiving. Working on Thanksgiving, that is not my intention.

3 MR. DAVID SHIELDS: That should be the 21st,
4 Your Honor, if I take your meaning to be two weeks from
5 yesterday.

6 THE COURT: Yes. That's just before Thanksgiving. So
7 does that seem -- If you all think that's too harsh a deadline,
8 let me know. Is that ---

9 MS. WHEATLEY: I have no objection to that.

10 THE COURT: Okay.

11 MR. DAVID SHIELDS: We're good with it, Your Honor.

12 THE COURT: November 21st.

13 MS. WHEATLEY: And one final comment I wanted to make
14 on Mr. Mimms' report and, again, this is from the Lanham Act
15 perspective. As a -- As a damages expert, he is not required to
16 opine on causation. As we've discussed, that's an element of
17 some claims. It's not an element of others. However, he can
18 testify as to the amount of damages and as to whether there are
19 intervening causes that go into that amount. And that's
20 certainly something that's subject to Cross Examination and
21 further proof. But for that reason, we think that his report ---

22 THE COURT: That's true. But if he -- I'm not saying
23 this is the fact. But if -- Is it Mister or Dr. Mimms?
24 Mr. Mimms, I think.

25 MS. WHEATLEY: I believe it's Mr. Mimms.

1 THE COURT: So if Mr. Mimms was asked the question, "So
2 did you consider the fact that there were vaccines that were
3 being developed during this period of the Spring of 2021? Did
4 you consider that at all?" And he says, "No, I didn't." That is
5 potentially a basis for the Court to exclude him because he -- he
6 has to exclude from his analysis other reasonable causes. There
7 are plenty of Fifth Circuit cases on that. It's not just an
8 issue of weight and argument. So I'm going to need to consider
9 this issue in light of that. He certainly can assume causation,
10 but he has to address something that is quite clear, relevant.
11 And in this case, this issue is relevant as evidenced by GPS' own
12 documents.

13 MS. WHEATLEY: Your Honor, I agree. And I do think on
14 that point Mr. Mimms discussed how there was both omicron --
15 There was a second wave of COVID --

16 THE COURT: Sure.

17 MS. WHEATLEY: -- that increased demands sharply, and
18 there was -- there was also a second wave of federal funding
19 which also impacted demand. And I don't believe he did say that
20 vaccines had no impact.

21 THE COURT: No, no. I wasn't suggesting he was saying
22 that. I was just giving that as an example.

23 MS. WHEATLEY: But, yes, I -- I agree that goes into
24 the validity of his opinion if it is such an obvious cause that
25 it was not considered.

1 THE COURT: But he's not going to be able -- I mean
2 just to cut to the chase, and I don't think you're arguing
3 otherwise, he's not going to be able to testify about causation.
4 He -- To the extent I permit him to testify, he will be assuming
5 causation.

6 MS. WHEATLEY: Correct, Your Honor.

7 THE COURT: "So assuming that the reason that sales
8 dropped was because of all the Zaatari tweets and the Open
9 Letter, what are the damages that GPS suffered?"

10 "Eight hundred gazillion dollars."

11 "And what is the basis for that?"

12 And then he'll explain that. That -- That's
13 appropriate testimony. He can't testify that there is causation
14 but he can assume causation. Now whether he properly excluded
15 other things that he needed to at least consider, I'm not holding
16 how I'm going to rule on that now.

17 MS. WHEATLEY: Yes, Your Honor. I believe that
18 completes the things I was going to discuss. I just want to make
19 sure no one on my team -- So I believe I can step down.

20 THE COURT: Okay. All right. All right, very good.

21 Okay. We're going to go off the record for a moment.

22 (A discussion was held between the Court and counsel
23 off the record.)

24 THE COURT: All right. Anything else?

25 MR. MASSO: I just wanted to make sure the ten-page

1 supplement is argument only, not additional evidence.

2 THE COURT: Correct. No additional evidence will be
3 received. You can point to evidence in the record but you cannot
4 present any new evidence. And, you know, if you all confer and
5 one of you has 12 pages and you want to get a two-page -- I'm not
6 going to go crazy on a short bump up, but when I say that,
7 sometimes lawyers think, "Oh, it's fine, 50 pages." No. Ten
8 pages, give or take, but you have to agree among yourselves if
9 you're going beyond it because I'm not giving one side an
10 extension and not the other.

11 MR. MASSO: Your Honor, something of interest for us
12 is -- and, you know, we will stick to 10 pages. We will not have
13 leakage into 11 or 12, but is that 10 pages for Mr. Tobin and
14 Mr. Reed and ten pages for Dr. Zaatar?

15 THE COURT: No. Ten pages, Defendants all together.
16 You don't have to, you know -- I mean the main issue that enVerid
17 is raising is the issue of lack of evidence of conspiracy and one
18 retweet, and I know that. So you don't need to write me that
19 telling me that. This is for something that was triggered here
20 that you feel the need to clarify, not repeat. I think I've
21 probably demonstrated that I've read your papers. So I don't
22 need to get hit with a sledge hammer. I'm mainly looking for
23 something subtle that, on reflection, we didn't get to today, not
24 telling me for the hundredth time what you've already told me.

25 MR. HIGGINS: Judge, do you have a preliminary ruling

1 on the striking of Max Sherman?

2 THE COURT: No. If I did, I would have told you that.

3 MR. HIGGINS: All right. Thank you.

4 MR. MUCKENFUSS: Thank you, Your Honor.

5 MR. MASSO: Thank you, Your Honor.

6 THE COURT: Okay. All right. Thank you.

7 COURT SECURITY OFFICER: All rise.

8 (Hearing adjourned at 12:05 PM.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF OFFICIAL REPORTER

I, Deborah A. Kriegshauser, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of Texas, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 10th day of November, 2022.

/s/ Deborah A. Kriegshauser

DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER